

# ORIGINAL



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## MEMORANDUM

TO: Docket Control

FROM: Ernest G. Johnson  
Director  
Utilities Division

EA for EGJ

DATE: January 26, 2007

RE: SECOND SUPPLEMENTAL REPORT OF STAFF IN THE MATTER OF THE APPLICATION OF WWC LICENSE LLC (WESTERN WIRELESS CORPORATION) FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER AND REDEFINITION OF RURAL TELEPHONE COMPANY SERVICE AREA (Docket No. T-04248A-04-0239)

Attached is Staff's Second Supplemental Report for WWC License LLC ("Western Wireless Corporation") Application for designation as an Eligible Telecommunications Carrier pursuant to Section 214(e)(2) of the Communications Act of 1934 and redefinition of rural telephone company service area pursuant to 47 C.F.R. § 54.207(c). Staff recommends approval of the Application subject to revised eligibility conditions and associated reporting requirements. A hearing has not been requested in this matter.

EGJ:RLB:tdp

Originator: Richard Boyles

Arizona Corporation Commission  
**DOCKETED**

JAN 26 2007

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SERVICE LIST FOR: WWC License LLC  
DOCKET NO.: T-04248A-04-0239

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**SECOND SUPPLEMENTAL STAFF REPORT  
UTILITIES DIVISION  
ARIZONA CORPORATION COMMISSION**

**WWC LICENSE LLC**


**DOCKET NO. T-04248A-04-0239**

**APPLICATION FOR DESIGNATION AS AN ELIGIBLE TELECOMMUNICATIONS  
CARRIER PURSUANT TO SECTION 214(e)(2) OF THE COMMUNICATIONS ACT OF  
1934 AND REDEFINITION OF RURAL TELEPHONE COMPANY SERVICE AREA  
PURSUANT TO 47 C.F.R. SECTION 54.207(c)**

**JANUARY 2007**

## STAFF ACKNOWLEDGMENT

The Second Supplemental Staff Report for WWC License LLC (Docket No. T-04248A-04-0239) was the responsibility of the Staff member listed below

A handwritten signature in black ink, appearing to read "Richard Boyles", is positioned above a horizontal line.

Richard Boyles  
Utilities Engineer

**EXECUTIVE SUMMARY  
WWC LICENSE LLC  
DOCKET NO. T-04248A-04-0239**

Based on its review of a Complaint in Colorado against Western Wireless Holding Company, Staff has set forth a revised set of eligibility conditions and associated reporting requirements for designation of WWC License LLC as an ETC.

Staff recommends that a grant of ETC designation to Western Wireless be further conditioned upon:

- 1) Western Wireless be required to post within each of its retail outlets, prior to receipt of any federal universal service funds and ongoing thereafter, signage which informs prospective customers of the availability of the Comparable Local Usage Plan and the rates for the Plan;
- 2) The Company be required, no later than January 31st of each year (beginning in 2008 and ending in 2010), to file with Docket Control as a Compliance item in this docket, a sampling of its Arizona Lifeline advertisements for the prior year. Such advertisements shall include information on the availability and price of the Comparable Local Usage Plan;
- 3) The Company shall take measures to ensure adequate ongoing training of retail personnel with respect to Arizona Lifeline offerings;
- 4) The Company be required, no later than January 31st of each year (beginning in 2008 and ending in 2010), to file a report with Docket Control as a Compliance item in this docket, indicating monthly subscription rates for the Comparable Local Service Plan for the prior year; and,
- 5) The Company be required, no later than January 31st of each year, to file with Docket Control as a Compliance item in this docket, an affidavit signed by an officer of the Company indicating full compliance with recommendations 1 and 3 above for the prior year.
- 6) The Company be required to a) report any actions brought against it in any states involving a failure to comply with its ETC obligations and b) report on the ultimate resolution reached by the FCC on the Colorado docket.

Staff recommends that the ALJ adopt a procedural order allowing parties an opportunity to comment on Staff's Second Supplemental Report and request a Hearing, if so desired. Staff should have the opportunity to file reply comments. If no hearing is requested, Staff respectfully requests that the ALJ incorporate these additional requirements into the ROO.

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## **I. Procedural Summary**

On March 26, 2004, WWC License LLC dba CellularOne ("Western Wireless" or "Company")<sup>1</sup> filed with the Commission an application for designation as an Eligible Telecommunications Carrier ("ETC") in certain wire centers of Qwest Communications ("Qwest"), Rio Virgin Telephone Co., Inc. ("Rio Virgin"), Southwestern Telephone Co. ("Southwestern") and Verizon California, Inc. ("Verizon").

On September 2, 2004, a Procedural Conference was held to address the timing and conduct of the proceeding in this Docket.

On December 30, 2004, Staff filed its Report on the application recommending approval of Western Wireless' application subject to conditions. Subsequently, on February 18, 2005, Western Wireless and ALECA<sup>2</sup> each filed a response to Staff's Report.

On March 10, 2005, a Procedural Conference was convened to discuss the need for a hearing in this matter. Western Wireless, ALECA and Staff all agreed that a hearing was not required, although ALECA reserved the right to request a hearing at a later date if it believed it necessary. Prior to the Procedural Conference, the FCC issued a press release stating that it would soon issue a Report and Order adopting additional requirements applicable to ETC applicants. Staff proposed to review the new FCC Order<sup>3</sup>, assess its impact on this Docket, and issue a Supplemental Staff Report within thirty days of the public release of the FCC Order. Western Wireless and ALECA both agreed with Staff's proposal which was subsequently adopted by Procedural Order issued on April 8, 2005.

On April 15, 2005, Staff filed a Supplemental Staff Report on the application recommending approval with revised conditions and reporting requirements. Subsequently, during May 2005, the parties made Responsive and Reply filings.

On August 1, 2005 Alltel Corporation announced that it had completed its merger with Western Wireless Corporation.

On August 23, 2005, the Administrative Law Judge filed her recommendation to the Commission in the form of a Recommended Opinion and Order ("ROO"). Consideration of this matter was tentatively scheduled for the Commission's September 7 and 8, 2005 Open Meeting. Prior to the Open Meeting Staff was informed of a Complaint proceeding in Colorado concerning Western Wireless' status as an ETC. Staff requested that the item be pulled from the

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<sup>1</sup> On August 1, 2005, Alltel announced it had completed its \$6.5 billion merger with Western Wireless Corporation. It is Staff's understanding that Western Wireless operates as a separate subsidiary of Alltel.

<sup>2</sup> ALECA was granted intervention by Procedural Order on October 27, 2004.

<sup>3</sup> *IN THE MATTER OF FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE*, CC Docket No. 96-45, Report and Order (Rel. March 17, 2005).



Open Meeting agenda to give Staff the opportunity to review the Colorado Complaint and the Colorado Commission's Decision on the Complaint.

On February 27, 2006, Western Wireless filed a request for acceptance of late-filed exceptions to the Recommended Opinion and Order. On March 15, 2006, ALECA filed a Motion requesting a thirty-day extension to file comments to Western Wireless' request for acceptance of late filed exceptions.

On January 24, 2007, Western Wireless filed a Notice of Withdrawal of Exceptions and Request That Recommended Opinion and Order Be Heard at Open Meeting.

## **II. The Colorado Complaint**

### **A. Nature of the Complaint**

On September 17, 2004, the Colorado Telecommunications Association ("CTA") filed a Complaint against Western Wireless Holding Company, Inc. ("WWHC"). Intervenors included the Colorado Office of Consumer Counsel ("OCC") and Staff of the Colorado Public Utilities Commission ("Colorado Staff").

In its Complaint, CTA alleged that WWHC failed to comply with commitments it made in a Stipulation approved by the Colorado Commission in order to obtain designation as an ETC and an Eligible Provider<sup>4</sup> ("EP"). Specifically, CTA alleged that WWHC failed to offer and advertise a Basic Universal Service Plan ("BUS") for \$14.99 as it had committed in the Stipulation. BUS utilizes a mobile customer premises unit that is the approximate size of a laptop computer. A BUS customer would buy or lease the unit and have the ability to plug a phone, fax machine or modem into it.

A hearing on the matter was held on March 7 and 8, 2005. CTA witness, Glenn H. Brown, testified that he had called various WWHC retail stores where WWHC was designated as an ETC and was told that the BUS offering was unavailable. He also checked the WWHC's website and found no mention of the BUS offering. In addition he called WWHC's toll free number to inquire about the availability of BUS. The first representative he spoke with asked for an offer code, which Mr. Brown obtained from a brochure previously acquired, and upon transfer to a second representative was finally told the offering was available.

CTA witness Michelle Anderson testified that she had visited one store and was provided a brochure from behind the sales counter and was told she had to call the 800 number to obtain the BUS offering. Ms. Anderson drove to a second store and the sales representative had no knowledge of the offering and no brochure was available. The store representative called another representative to inquire about the availability of BUS. The person on the phone explained to Ms. Anderson that the BUS offering was available but that she would have to talk to

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<sup>4</sup> Designation as an EP made WWHC eligible to receive Colorado High Support Mechanism Funds.

someone in another department to order the service. Identification of the other department was not provided. Ms. Anderson then visited a third store. At this store a representative attempted to interest her in a different plan. When she insisted on the BUS offering, a different representative went into an office and returned with a package of brochures; one of which he gave to her. Ms. Anderson was told the WWHC did not intend to advertise the plan and that prospective customers would have to ask for it and order it via the 800 number. At a fourth store, two representatives were not aware of the BUS offering although a third was. The representative indicated he had no brochures but did refer her to the 800 number. He also attempted to interest her in a different plan that would be immediately available at the store. Subsequent to visiting the stores, Ms. Anderson called the 800 number where, after she was transferred multiple times, was told that while the BUS offering was available in six other states it was not yet available in Colorado.

Colorado Staff witness Pam Fischhaber testified that Staff does not believe that WWHC is complying with provisions of the Telecommunications Act of 1996 ("TA96"), 47 U.S.C. § 214(e) in regard to advertising universal service offerings, especially the BUS offering. Ms. Fischhaber testified in part that, in her opinion, BUS was not available from October 2002 through March 2004; WWHC violated the Stipulation by not making BUS available for some sixteen months after its compliance filing of November 8, 2002; and WWHC restricted the availability of the offering to customers with poor credit ratings and failed to advertise.

Ms. Fischhaber, on behalf of Colorado Staff, recommended that the Colorado Commission: 1) revoke all ETC and EP designations for WWHC, 2) in the alternative the Colorado Commission send a copy of the record in the proceeding to the FCC with a recommendation that WWHC make reparations, 3) if WWHC's ETC and EP designations were revoked that consideration be given to providing a copy of its Order to states where Western Wireless has been designated as an ETC, and, 4) a copy of the record be provided to the Colorado State Attorney General's Office with a request to investigate misleading and deceptive business practices.

WWHC witness James Blundell testified that WWHC is committed to making the BUS offering available to customers. Mr. Blundell stated that since the November 8, 2002 filing was available to the public at the Colorado commission, WWHC considers it to have provided notice of the availability of the BUS offering. He further stated that a customer could ask for it at a WWHC retail store or by telephone. A customer could escalate a request for the BUS offering to corporate headquarters should a representative not be familiar with the service offering. Mr. Blundell also testified that WWHC's Internet ordering system did not display the BUS offering until 2004. When its absence was discovered, BUS was added to the system and brochures were printed for delivery to WWHC's retail locations. In regard to advertising, Mr. Blundell stated that WWHC does advertise in the areas it serves but WWHC does not believe the TA96 requires advertisement of every rate plan.

## **B. Colorado ALJ's Recommended Decision**

On August 16, 2005, the Recommended Decision of the Colorado Administrative Law Judge ("ALJ")<sup>5</sup> imposing certain sanctions was mailed (Attachment 1).<sup>6</sup> The ALJ found, in pertinent part, that CTA had met its burden of proof by establishing that WWHC had violated the terms of the Stipulation; that a major factor in WWHC's ETC designation was the offering of the BUS service; that BUS was not generally available to customers for the period of November 8, 2002 through March 23, 2004; that WWHC did not advertise BUS until March of 2004 and that brochures, even then, were not available at all retail locations or in the view of customers and that no customer had ordered BUS as of the date of the Hearing. The ALJ, however, found that the record was less clear as to whether WWHC had violated federal or state law to justify revocation of ETC and EP designation. The Recommended Decision ordered WWHC to report BUS "take rates" on a quarterly basis and to immediately initiate a training program for its retail employees. As a sanction, WWHC was ordered, in consultation with the other parties, to file a plan covering the period of November 8, 2002, through March 23, 2004, for reparations to its Colorado customers with the Colorado Commission.

## **C. Exceptions**

Exceptions to the Recommended Decision were filed by CTA, OCC and Colorado Staff (collectively "Joint Exceptors") and WWHC. Consideration of the exceptions came before the Colorado Commission on October 5, 2005, and on November 22, 2005, an Order<sup>7</sup> of the Colorado Commission addressing the exceptions became effective (Attachment 2).

The Joint Exceptors, while generally supportive of the reparation concept addressed in the Recommended Decision, argued that the facts supported revocation of WWHC's federal ETC status. Should WWHC's ETC status not be revoked, the Joint Exceptors continued to support Colorado Staff's recommendation to provide a copy of the record to the FCC. Secondly, the Joint Exceptors ask that the dates for non-compliance be found to be from November 8, 2002 through March 7, 2005 rather than March 23, 2004. According to the Joint Exceptors, witnesses testified that the BUS offering was neither advertised nor available in the fall of 2004 when attempts to order it occurred. Further evidence in the record indicated that, as late as January of 2005, WWHC retail personnel were unaware of the BUS service and training on the product.

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<sup>5</sup> *IN THE MATTER OF THE COMPLAINT BY THE COLORADO TELECOMMUNICATIONS ASSOCIATION AGAINST WESTERN WIRELESS HOLDING COMPANY, INC.*, Recommended Decision of Administrative Law Judge William J. Fritzel Granting Complaint and Ordering Sanction, Docket No. 04F-474T, Decision No. R05-0988, Mailed August 16, 2005 ("Recommended Decision").

<sup>6</sup> In Colorado, if no exceptions are filed within twenty days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission.

<sup>7</sup> *IN THE MATTER OF THE COMPLAINT BY THE COLORADO TELECOMMUNICATIONS ASSOCIATION AGAINST WESTERN WIRELESS HOLDING COMPANY, INC.* ORDER GRANTING EXCEPTIONS IN PART, Docket No. 04F-474T, Decision No. C05-1378, Adopted October 5, 2005, Mailed (Effective) November 22, 2005 ("Exception Order").

Finally, the Joint Exceptors asked for a finding that WWHC violated both federal and state law by not advertising the availability of the BUS service.

WWHC argued that the matter should be dismissed on jurisdictional grounds because WWHC is not a public utility subject to complaint proceedings under Colorado law. Although the ALJ twice dismissed its Motion to Dismiss, WWHC asked the Colorado Commission to reverse the finding. Second WWHC asserted that its November 2002 compliance filing provided public notice of the BUS service, its price, availability and applicable calling areas and thus, under filed rate doctrine, the Colorado Commission should dismiss the Complaint. WWHC also notes that if a customer had wanted to purchase BUS, a sales representative would have escalated that request within the WWHC in order for the service to be provisioned. WWHC also disagreed with the ALJ's conclusion regarding the necessity for WWHC to run advertisements specific to BUS. In support of its position it cited the *Universal service Order*<sup>8</sup> where the FCC chose not to impose specific advertising standards. WWHC also maintains that regardless of past dispute on this issue WWHC addressed Colorado Staff's concerns and eliminated those concerns on this issue on a going-forward basis. Finally, WWHC responded to the reparations issue and argued that state statutes do not authorize the Colorado Commission to award reparations in this matter.

The Colorado Commission found that it derived its authority to make a determination in the matter directly from federal law. 47 U.S.C. § 214(e)(2) of TA96 gives State Commissions the primary responsibility for determining ETC designations. Further, the Colorado Commission found the Complaint provided sufficient information in regards to advertising such that WWHC was, or should have been, on notice that a failure to advertise was an allegation of the Complaint. The Colorado Commission found WWHC's arguments regarding there being no requirement to individually advertise each supported service meritless. The Colorado Commission found that WWHC was required to advertise the availability and price of the BUS service. In regards to WWHC's filed rate doctrine argument, the Colorado Commission failed to see relevance between it and an ETC's statutory advertising responsibilities.

The Colorado Commission agreed with the Joint Exceptors that the time period for the violation should run from November 8, 2002 through March 7, 2005 and not end on March 23, 2004 as found in the Recommended Decision. In addition to being in violation of the public interest portion of the Stipulation, the Colorado Commission stated it was probable that WWHC was in violation of federal law as well. In this regard the Colorado Commission deferred to the FCC for a determination as to whether WWHC was required by federal law to specifically advertise BUS. The Colorado Commission stated that it was hesitant to rescind WWHC's ETC status at this time due to possible unintended consequences to those rural customers who now rely on WWHC for service.

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<sup>8</sup> *IN THE MATTER OF FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE*, cc Docket No. 96-45, Report and Order, FCC 97-157, paras. 128, 130 (rel. May 8, 1997) ("*Universal Service Order*").

The Colorado Commission agreed with WWHC that reparations to Colorado consumers were not an appropriate remedy in this matter. Notwithstanding the difficulty in determining an amount, the recipients and a method of disbursement, it was not clear to the Colorado Commission that reparations could be awarded pursuant to Colorado law. Further, such reparations do not mitigate harm to the federal universal service fund or harm to the regulatory process. Therefore, the Colorado Commission found it was more appropriate to forward its findings to the FCC and the Universal Service Administrative Company ("USAC"), along with a complete record of the matter. In the Colorado Commission's opinion, the FCC clearly has the authority to make a determination as to whether WWHC should be required to return ETC funds it received during the period in which it failed to offer or advertise BUS and in what amount. The Colorado Commission declined to take any action regarding Colorado Staff's recommendation that a copy of the record be provided to the Colorado State Attorney General's Office with a request to investigate misleading and deceptive business practices.

On December 12, 2005, the OCC filed an Application for Rehearing, Reargument or Reconsideration of the *Exception Order* requesting that in addition to any action taken by the FCC, the Colorado Commission adopt a remedy, sanction or combination thereof against WWHC for its violation of the Stipulation and that WWHC be precluded from collecting from the Colorado High Cost Fund for the violation period. No action was taken on the Application by the Colorado Commission.

#### **D. Related United States District Court Suit**

On January 10, 2005, WWHC filed a Motion in the United States District Court for the District of Colorado seeking declaratory and injunctive relief against the Commissioners of the Public Utilities Commission of Colorado for imposing conditions to granting WWHC's Application as an ETC. A Memorandum Opinion and Order (Attachment 3) was issued by the Court on March 8, 2006.

In Count 1, WWHC claimed the Colorado Commission is regulating rates and has no authority to do so because of Federal law preemption in 47 U.S.C. § 332(c)(3)(A). The Colorado Commission contended that the conditions that WWHC must price its services in accordance with the Stipulation and must submit its pricing plans for Commission approval were necessary to ensure that the rates charged were "just, reasonable and affordable" under § 254(i). ETC designation is in the "public interest" under § 214(e), and rates are not discriminatory. The Court found that while the Colorado Commission may make this policy decision, to implement the Decision it first must petition the FCC for authority to do so. The Court found the Colorado Commission had failed to follow the prescribed procedure, arbitrarily imposed an "affordability" review without setting forth any standards and that the Colorado Commission's conditions constitute rate regulation for which it had no authority to do.

In Count II, WWHC alleges the Colorado Commission had no authority to regulate interstate services. The Colorado Commission did not disagree but argued that ETC services are subject to its oversight. The Court found that because interstate and intrastate services are not

separable by wireless service carriers in the competitive market the serve, the Colorado Commission's position that it was not regulating interstate services was not tenable.

In Counts III and IV, WWHC challenged the quality of service standards imposed by the Colorado Commission's Decision because the requirements conflict with § 214(e)(1), conflict with the FCC's pronouncement in *In the Matter of Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 (1997), effectively change WWHC's regulatory status to that of an incumbent local exchange carrier, and fail to comply with § 254(f). In its discussion, the Court stated that although § 332(c)(3)(A) prohibits a State from regulating the entry or rates charged by carriers such as WWHC, it does not prohibit "a State from regulating the other terms and conditions of commercial mobile services," as recognized by the FCC in its March 17, 2005 Report and Order. In that Report and Order, the FCC adopted minimum requirements for a telecommunications carrier to be designated as an ETC where the FCC acts on the designation. One such requirement is for an applicant to demonstrate that it will satisfy consumer service and service quality standards, which the FCC concluded was not inconsistent with § 332. However, although the guidelines established in the Report and Order are not binding on States and the FCC declined to mandate that States adopt them, the FCC did encourage States that exercised jurisdiction over ETC designations under § 214(e)(2) to impose the same requirements. The Court found that while the Colorado Commission may impose service standards which do not constitute a barrier or condition to entry precluded under § 332(c)(3)(A), such standards may only be imposed through regulations adopted under § 254(f) and following rule-making procedures under C.R.S. §§ 24-4-101 *et seq.* (Colorado State Administrative Procedure Act). Application of rule-making procedures ensure the requirements of § 254(f) are met and thus, in the absence of regulations adopted by the Colorado Commission setting forth applicable quality of service standards, such standards cannot be imposed.

In Count V, WWHC claimed that under 42 U.S.C. § 1983 the imposed conditions violate the Act. The Court found the issue had been resolved and that to the extent WWHC was claiming a property right protected by the Fourteenth Amendment to the U.S. Constitution, the right was co-extensive with the Court's foregoing analysis and therefore the § 1983 claim was redundant.

In Count VI, WWHC alleged that the Colorado Commission exceeded its authority under C.R.S. §§ 40-1-103 and 40-14-401. The Court declined to exercise supplemental jurisdiction as to Count VI. The Court found that the claim raised issues of state law and interpretation of statutes that must be decided under procedures for judicial review of agency action set forth in C.R.S. § 40-6-115 and C.R.C.P. 106.

As a result of the Court's findings, the Colorado Commission was enjoined from enforcing submission of pricing plans for approval as a condition to designating WWHC as an ETC under the ACT. Further, the Colorado Commission was enjoined from enforcing compliance with the conditions contained within the Stipulation as a condition to designating WWHC as an ETC under the ACT.

**E. Update on Related Alltel Communication, Inc ("Alltel") ETC Application, Decision No. 67403**

As previously discussed, Alltel filed its own application for designation as an ETC prior to acquiring WWHC (See footnote 1). On November 2, 2004, the Commission issued Decision No. 67403 approving an Application by Alltel for ETC status conditioned upon Alltel's compliance with certain conditions. Subsequent to the Decision, on December 15, 2004, Alltel filed a letter in the docket<sup>9</sup> which stated, in part, that Alltel "must regrettably decline ETC designation in the state of Arizona. Alltel also did not comply with the conditions precedent to its designation. Further, on September 21, 2005, in a response to a Compliance and Enforcement Notice, Alltel stated that "Because Alltel declined the designation, and has not made the compliance filings required in order to render the designation effective, the Commission can consider that designation to be void, without prejudice to either the Company's current ETC application or any future application filed by the Company." However, on August 25, 2006, Alltel sent a letter to the Director of Utilities which stated that it wished "to withdraw its December 15, 2004, letter and agrees to comply with the conditions of the ETC designation established in Decision No. 67403." On October 26, 2006, a Procedural Conference was conducted at the request of Staff to discuss the various filings made by Alltel and to discuss the status of Alltel's ETC designation.

At the Procedural Conference, Alltel stated it concurred with Staff's viewpoint that from a process perspective, given the legal issues raised, including new FCC ETC guidelines, it would be simpler for Alltel just to reapply for ETC status. Alltel indicated that it anticipated it would submit a new application for ETC designation in the near future. The Administrative Law Judge set forth a process to formally recognize Alltel's relinquishment to bring finality to the matter of Alltel's earlier designation.

On December 22, 2006, the Administrative Law Judge filed a Procedural Order which ordered that by the letter ALLTEL Communications, Inc. filed in Docket No. T-03887A-03-0316 on December 15, 2004, ALLTEL Communications, Inc. relinquished the designation as an ETC conditionally granted in Decision No. 67043.

**III. Staff Analysis**

Staff reviewed the Colorado Complaint to determine if the facts in that matter might impact Staff's recommendation in this Docket. While BUS is not a service which Western Wireless intends to offer in Arizona, the ALJ has recommended that the Company offer a local usage plan comparable to the one offered by the underlying local exchange carrier. Therefore the infraction at issue in the Colorado Complaint does have some relevance and raises some concerns relative to the Company's Application. Another concern Staff has as a result of the Colorado Complaint proceeding is that there certainly is a question raised as to whether the Company's failure to advertise the BUS Plan was intentional. At a minimum, it appears clear

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<sup>9</sup> Docket No. T-03887A-03-0316.

that the Company made it very difficult for customers to sign up for the Plan by not allowing customers to sign up at retail outlets, but instead requiring them to call an 800 number. Even then, the Colorado record indicates that sales representatives in some cases were not aware of the BUS Plan or in some cases tried to steer the caller to another more expensive Plan. Also, Staff believes the Company clearly had an obligation to advertise the availability of this Plan to Colorado consumers but it failed to do this.

Despite this, the Colorado Commission still found WWHC's designation to be in the public interest but referred its record to the FCC for a determination with respect to prior funding the Company had received. The Colorado Commission also reported to the FCC that WWHC has expended its ETC funds in an appropriate manner and recommended that WWHC be certified for 2006.<sup>10</sup> The FCC has acknowledged Staff receipt of the Colorado record but, as of the date of this report, has not taken any action.

Because of the concerns raised by the Colorado proceeding, Staff believes that grant of the Company's Application is only in the public interest as long as additional safeguards are imposed. These safeguards are designed to ensure that a repeat of what happened in Colorado does not happen in Arizona. Staff's recommended conditions herein together with those already contained in the Recommended Opinion and Order, should prevent a recurrence of these events in Arizona. In addition to the recommended annual reporting and certification requirements to insure that Western Wireless remains in compliance with the conditions contained in the Recommended Order should the Commission adopt it, Staff recommends the following:

- 1) Western Wireless be required to post within each of its retail outlets, prior to receipt of any federal universal service funds and ongoing thereafter, signage which informs prospective customers of the availability of the Comparable Local Usage Plan and the rates for the Plan;
- 2) The Company be required, no later than January 31st of each year (beginning in 2008 and ending in 2010), to file with Docket Control as a Compliance item in this docket, a sampling of its Arizona Lifeline advertisements for the prior year. Such advertisements shall include information on the availability and price of the Comparable Local Usage Plan;
- 3) The Company shall take measures to ensure adequate ongoing training of retail personnel with respect to Arizona Lifeline offerings;
- 4) The Company be required, no later than January 31st of each year (beginning in 2008 and ending in 2010), to file a report with Docket Control as a Compliance item in this docket, indicating monthly subscription rates for the Comparable Local Service Plan for the prior year; and,

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<sup>10</sup> See fn 17, *Exception Order*.



- 5) The Company be required, no later than January 31st of each year, to file with Docket Control as a Compliance item in this docket, an affidavit signed by an officer of the Company indicating full compliance with recommendations 1 and 3 above for the prior year.
- 6) The Company be required to a) report any actions brought against it in any states involving a failure to comply with its ETC obligations and b) report on the ultimate resolution reached by the FCC on the Colorado docket.

Staff recommends that the ALJ adopt a procedural order allowing parties an opportunity to comment on Staff's Second Supplemental Report and request a Hearing, if so desired. Staff should have the opportunity to file reply comments. If no hearing is requested, Staff respectfully requests that the ALJ incorporate these additional requirements into the ROO.

Attachment 1

Colorado Decision R05-0988

Recommended Decision of Administrative Law Judge William J. Fritzell  
Granting Complaint and Ordering Sanctions

Mailed Date: August 16, 2005

Decision No. R05-0988

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 04F-474T

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IN THE MATTER OF THE COMPLAINT BY THE COLORADO TELECOMMUNICATIONS  
ASSOCIATION AGAINST WESTERN WIRELESS HOLDING COMPANY, INC.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
WILLIAM J. FRITZEL  
GRANTING COMPLAINT AND  
ORDERING SANCTIONS**

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Mailed Date: August 16, 2005

Appearances:

Barry L.Hjort, Esq., Glendale, Colorado, for the Colorado  
Telecommunications Association, Inc.;

Philip R. Schenkenberg, Esq., Saint Paul, Minnesota; and  
Andrew R. Newell, Esq., Denver, Colorado, for Western Wireless  
Holding Company, Inc.;

Gregory E. Bunker, Assistant Attorney General, Denver, Colorado,  
for the Colorado Office of Consumer Counsel; and

Michael J. Santisi, Assistant Attorney General, Denver, Colorado,  
for the Staff of the Colorado Public Utilities Commission.

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**I. STATEMENT OF THE CASE**

1. On September 17, 2004, the Colorado Telecommunications Association (CTA) filed a complaint against Western Wireless Holding Company, Inc. (Western Wireless)<sup>1</sup>

2. On September 20, 2004, the Commission issued an Order to Satisfy or Answer. On the same date, the Commission scheduled a hearing for October 29, 2004.

3. On September 29, 2004, the Colorado Office of Consumer Counsel (OCC) filed a Notice of Intervention.

4. On October 12, 2004, Staff of the Colorado Public Utilities Commission (Staff) intervened in the case.

5. On September 30, 2004, Western Wireless filed a Motion to Dismiss the Complaint.

6. On October 14, 2004, CTA filed an Unopposed Motion to Vacate the Hearing scheduled for October 29, 2004.

7. By Interim Order No. R04-1214-I mailed on October 15, 2004, the Motion to Vacate the Hearing was granted and the hearing was rescheduled for January 5, 2005.

8. On October 15, 2004, CTA, OCC, and Staff filed a Joint Response to the Motion to Dismiss of Western Wireless.

9. On October 25, 2004, Western Wireless filed a Reply Brief in Support of its Motion to Dismiss the Complaint.

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<sup>1</sup> Western Wireless states in its post-hearing Statement of Position, page no. 1 that WWC Holding Company, Inc., is the proper party in interest as successor to Western Wireless Holding Company, Inc.

10. On December 10, 2004, Western Wireless filed an Unopposed Motion to Vacate the Hearing scheduled for January 5, 2005. The Motion to Vacate was granted in Decision No. R04-1506-I (December 16, 2004). The hearing was rescheduled for February 8, 2005.

11. On January 11, 2005, in Decision No. R05-0042-I the motion of Western Wireless to dismiss the complaint was denied.

12. On February 17, 2005, CTA filed an Unopposed Motion to Vacate the Hearing Scheduled for February 8, 2005. By Interim Order No. R05-0226-I (February 23, 2005), the motion was granted and the hearing was rescheduled for March 7 and 8, 2005.

13. The hearing was held on March 7 and 8, 2005. Testimony was received from witnesses and Exhibit Nos. 1 through 12; 13A, 13B, and 13C through 40 were marked for identification. Exhibit Nos. 1 through 13A, B, C, 14 through 25, 27, 29, 30, 37, 38, 39, and 40 were admitted into evidence. Exhibit Nos. 26, 28, and 31 through 36 were not offered into evidence.

14. At the conclusion of the hearing, on March 8, 2005, a briefing schedule was established and the matter was taken under advisement.

15. On April 8, 2005, CTA, OCC, and Staff filed briefs and/or opening Statements of Position. On April 18, 2005, Western Wireless filed its Post-Hearing Statement of Position.

16. On May 13, 2005, CTA, OCC, and Staff filed closing Statements of Position.

17. In its Post-Hearing Statement of Position, Western Wireless renewed its Motion to Dismiss the Complaint on jurisdictional grounds. The renewed motion does not assert any new argument or authority in support of its motion, therefore the renewed motion to dismiss is denied.

18. Pursuant to § 40-6-109, C.R.S., the record and exhibits of the hearing and a written recommended decision is transmitted to the Commission.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

19. CTA is an association of Colorado rural local exchange providers.

20. Western Wireless is a commercial mobile radio service wireless telecommunications provider doing business in Colorado under its brand name, CellularOne.

21. The Commission has jurisdiction to hear the Complaint. Western Wireless submitted to the Commission jurisdiction pursuant to the stipulation it signed, approved by the Commission in Docket No. 00K-255T.

22. On September 17, 2004, CTA filed a complaint against Western Wireless alleging that Western Wireless, as a telecommunications carrier designated by this Commission as an Eligible Telecommunications Carrier (ETC) and Eligible Provider (EP), failed to comply with commitments it made in order to obtain designation as an ETC and EP eligible to collect high cost support funds. CTA alleges certain commitments were made in a Stipulation approved by the Commission in the consolidated docket of 00K-255T, Decision Nos. R01-0019, C01-0476, and C01-0629,<sup>2</sup> as a basis for the Commission's approval of the designation of Western Wireless as an ETC and EP.

23. CTA alleges that Western Wireless failed to offer a Basic Universal Service (BUS) Plan for \$14.99 in its service areas as it committed to do under the terms of the Stipulation.

24. The above referenced Stipulation and Settlement Agreement is central to the complaint of CTA. On September 11, 2000, in Docket No. 00A-174T, Western Wireless filed an

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<sup>2</sup> Hearing Exhibits 3A, 3B, and 3C.

application with the Commission for designation as an eligible telecommunications provider pursuant to 4 *Code of Colorado Regulations* (CCR) 723-41-8. On the same date, Western Wireless also filed an application with the Commission in Docket No. 00A-171T for designation as an ETC pursuant to 4 CCR 723-42-7. The two applications were consolidated and designated as Docket No. 00K-255T. The parties to this consolidated proceeding were Western Wireless, CTA, Qwest Corporation, OCC, and Staff. As a result of the proceeding in the applications, a Stipulation and Settlement Agreement was executed by Western Wireless, OCC, and Staff. Western Wireless agreed to offer and advertise a \$14.99 BUS Plan in designated Colorado rural exchanges. The Stipulation was approved by the Commission and Western Wireless was designated as an ETC and EP under the provisions of 47 U.S.C. § 214(e), 4 *Code of Federal Regulations* (C.F.R.) § 54.101 *et seq.* and 4 CCR 723-42-7.

25. The designation as an ETC made Western Wireless eligible to receive Federal Universal Support Funds (USFs) and the designation of Western Wireless as an EP provided eligibility to receive Colorado High Support Mechanism Funds in providing basis Universal Service in certain Colorado rural high cost areas.

26. Western Wireless agreed in the Stipulation to offer its BUS for \$14.99 "... as a wireless application based on its existing mobile cellular service in Colorado."<sup>3</sup> The service would use a mobile customer premises unit a customer would buy or lease. The approximate size of the unit is that of a laptop computer, into which a customer would plug a telephone, fax machine, or modem. Western Wireless agreed to make its BUS offering to the public in its designated service areas upon completing its compliance filing with the Commission.<sup>4</sup> Western

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<sup>3</sup> Stipulation, Exhibit No. 3C, page 5, paragraph 3.

<sup>4</sup> Stipulation, Exhibit No. 3C, page 12, paragraph A.

Wireless made its compliance filing with the Commission on November 8, 2002.<sup>5</sup> Thus, Western Wireless was obligated by the terms of the Stipulation to offer its \$14.99 BUS Plan starting on November 8, 2002, the date of its compliance filing with the Commission.

27. Western Wireless also made a commitment in the Stipulation to "... advertise the availability of [the BUS offering] and charges using media of general distribution in accordance with federal and state requirements."<sup>6</sup>

28. The parties to the Stipulation agreed and stated that this Commission has the authority to enforce compliance with the Stipulation.<sup>7</sup>

29. After receiving designation as an ETC and EP in the consolidated docket, 00K-255T (WW1), Western Wireless filed a second application on February 14, 2003 for ETC and EP designation in additional Colorado rural exchanges (WW2). On January 8, 2004, Western Wireless filed another application for designation of additional Colorado rural exchanges (WW3).

30. CTA became concerned about whether Western Wireless was actually offering the \$14.99 BUS Plan after reviewing the testimony of Ms. Patricia Parker in WW3. Ms. Parker was a witness for OCC, a party in the WW3 docket. In that docket, Ms. Parker testified<sup>8</sup> concerning the availability and advertising of the \$14.99 BUS Plan that Western Wireless committed to in the Stipulation. Ms. Parker who testified at the instant hearing on behalf of the OCC stated that she had concerns about the availability of the BUS offering and lack of advertising of the offering. Ms. Parker testified that in preparing for the WW3 docket, she conducted an

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<sup>5</sup> Transcript No. 1, testimony of Pamela Fischhaber, page 104. See also hearing exhibit No. 30.

<sup>6</sup> Stipulation, page 5, paragraph no. 4.

<sup>7</sup> See Stipulation, page 12, paragraph C.

<sup>8</sup> Hearing Exhibit No. 6.



investigation of whether or not Western Wireless offered the BUS to customers in its designated service territory. She called Western Wireless retail stores branded as CellularOne, and authorized CellularOne dealers on April 6, 2004 and May 17, 2004. She testified that she called the Canon City and Salida CellularOne stores in which she asked about the availability of the \$14.99 BUS. The CellularOne representatives at the store told Ms. Parker that they were unaware of the offering. They told Ms. Parker that the lowest cost plan was \$20 a month. Ms. Parker also called the CellularOne 800 number. She talked to two CellularOne representatives who were unaware of the \$14.99 plan. Ms. Parker also called CellularOne stores or authorized agents located in Alamosa, Trinidad, Westcliffe, and Monte Vista. None of the sale representatives at these stores was aware of the \$14.99 BUS Plan. As a result of her investigation, Ms. Parker concluded that Western Wireless did not have the \$14.99 BUS offering prior to the commencement of the hearing in WW3 on May 17, 2004.

31. Ms. Parker testified at the instant hearing that Western Wireless is receiving federal funds for a service that they were not advertising. Ms. Parker believes that the \$14.99 plan existed at the time of the hearing in the instant case, however, the public is unaware of the offering since Western Wireless does not advertise. Ms. Parker testified that Western Wireless has no customers for its \$14.99 BUS Plan.

32. CTA witness, Glenn H. Brown, a consultant, was retained by CTA to conduct an investigation of the availability of Western Wireless' \$14.99 BUS offering. In his prefiled direct testimony,<sup>9</sup> Mr. Brown testified that on July 28, 2004, he called various Western Wireless retail stores located in areas where Western Wireless was designated as an ETC and EP provider. Mr. Brown called CellularOne retail stores in Alamosa, Canon City, and Pueblo. In each case,

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<sup>9</sup> Hearings Exhibit No. 1.

Mr. Brown testified that a \$14.99 BUS offering was unavailable and that the cheapest local service offering that was available was \$30 per month.<sup>10</sup> Mr. Brown stated that he also checked the CellularOne website to determine if CellularOne had a \$14.99 BUS offering. Mr. Brown stated that the website had no mention of the \$14.99 BUS Plan.

33. On September 7, 2004, Mr. Brown called CellularOne's toll free number to inquire about the availability of the BUS offering in Pueblo. The CellularOne representative asked for an "offer code". Mr. Brown gave the representative the code number "299" that he obtained from a CellularOne brochure. He was transferred to a second representative who told him that the offering was available. Mr. Brown stated that based on his investigation:

... A normal consumer making a reasonable inquiry into the products and services offered by Western Wireless would be totally unaware that the affordable BUS offering actually existed. It took repeated questioning with the specific product knowledge to even find out if the product actually existed.<sup>11</sup>

34. During August, 2004, CTA witness Michelle Anderson testified that Glenn Brown asked her to research the availability of the \$14.99 BUS offering in Colorado. Ms. Anderson stated that on or about September 2, 2004, she visited the CellularOne Store in Alamosa. She told the sales representative that she was interested in the 14.99 unlimited local calling plan. The representative produced a brochure from behind the counter and handed it to Ms. Anderson telling her that she needed to call an 800 number listed on the brochure to order the service. Ms. Anderson next drove to Salida where she visited a CellularOne retail store. Ms. Anderson asked for the \$14.99 BUS. The sales representative had no knowledge of the plan. The representative contacted a CellularOne representative by telephone to inquire of the availability of the plan. The Salida clerk handed the phone to Ms. Anderson who explained to the person on

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<sup>10</sup> Page 5, Exhibit No. 1.

<sup>11</sup> Exhibit No. 1, pages 13 and 14.

the phone what she wanted. The CellularOne representative on the phone told Ms. Anderson that the plan was available and that Ms. Anderson would have to talk with someone else in another department to order the service. Their representative did not tell Ms. Anderson what department to contact for an order. Ms. Anderson testified that while she was at the Salida store, she asked for a brochure regarding the \$14.99 plan. No brochure was available.

35. Ms. Anderson next visited the CellularOne store located in Canon City. At this store, Ms. Anderson told the sales representative that she was interested in the \$14.99 BUS Plan. The sales representative responded that the \$30 plan would offer much more than the \$14.99 plan, however, Ms. Anderson insisted on information on the \$14.99 plan. Another CellularOne representative, possibly the store manager, walked to his office and obtained a pack of CellularOne brochures and gave Ms. Anderson one stating that the brochure described the \$14.99 plan.<sup>12</sup> He told her that she would have to call CellularOne's 800 number printed on the brochure to order the service. In response to Ms. Anderson's inquiry, the representative told her that CellularOne did not intend to advertise this plan and that prospective customers would have to ask for it and order it by calling the 800 number.

36. Ms. Anderson then traveled to the CellularOne store located on U.S. Highway 50 in Pueblo. Two of the sales representatives were not aware of the \$14.99 plan, however, another representative was aware of the plan. This sales representative had no brochures to offer, however, he told Ms. Anderson that she would have to call the CellularOne 800 number to order the plan. The representative encouraged Ms. Anderson to sign up for the \$30 or \$40 plan which he said would be immediately available at the store.

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<sup>12</sup> Hearing Exhibit No. 33.

37. On the next day after visiting the stores (September 3, 2004), Ms. Anderson called the 800 number listed on the \$14.99 BUS Plan brochure. She was transferred approximately three times since at least three representatives were not familiar with the \$14.99 BUS Plan. Ms. Anderson was finally transferred to another department. The customer service representative told her that the \$14.99 plan was available in six states, however, it was not yet available in Colorado.

38. Staff witness Pam Fischhaber testified that ETCs are designated pursuant to the provisions of the Telecommunications Act of 1996 (Act), 47 U.S.C. § 214(e). The ETCs are eligible to receive Universal Service support pursuant to § 254 of the Act. Under § 214(e)(1)<sup>13</sup> ETCs are required to: (A) offer services that are supported by the support mechanisms of § 254(c); and (B) advertise the services and charges in media of general distribution.

39. Ms. Fischhaber stated that Western Wireless has approximately 17 Universal Service offerings that may qualify for support. She does not believe that Western Wireless is complying with the requirements of the Act in regard to advertising universal service offerings, especially the \$14.99 BUS plan.

40. Although Western Wireless filed its agreement letter (Exhibit No. 30) on November 8, 2002, in compliance with the Stipulation, which in effect advised the Commission and presumably the public that the \$14.99 BUS was available, Ms. Fischhaber believes that the \$14.99 plan was not available to customers until March 23, 2004. She believes that not only was the \$14.99 plan not advertised in media of general circulation as required by the Stipulation and the Act, Western Wireless did not have any procedures in place for the ordering and installation

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<sup>13</sup> Exhibit No. 12.

of the plan until March 23, 2004 at which time Western Wireless placed the plan on its Einstein ordering system.

41. Western Wireless received USF support funds starting in October 2002. It has received the support funds through November 2004.<sup>14</sup> Western Wireless witness James Blundell confirmed that Western Wireless has received USF support funds that are listed on Confidential Exhibit No. 14.<sup>15</sup>

42. Ms. Fischhaber believes that Western Wireless violated 47 U.S.C. § 214(e)(1)(B) by failing to advertise the availability and charges for its BUS offering and violated § 214(e) of the Act by obtaining USF support funds for its \$14.99 BUS Plan which she believes was not available from October 2002 through March 2004.

43. In addition, Ms. Fischhaber testified that in her opinion, Western Wireless has not complied with the Stipulation. Ms. Fischhaber believes that Western Wireless violated the Stipulation by not making available the \$14.99 BUS offering for some 16 months after the time it made its compliance filing with the Commission on November 8, 2002 and failing to advertise the BUS plan. In addition, this witness believes that after offering the plan, Western Wireless restricted the availability of the offering to customers with poor credit ratings; failed to provide Staff and OCC advertising materials of its BUS offering; and submitted line counts and obtained USF support for CenturyTel wire centers without filing with the Commission the offering. Finally, Ms. Fischhaber believes that Western Wireless violated 4 CCR 723-42-7.2.6 by failing to advertise.

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<sup>14</sup> Confidential Exhibit No. 14.

<sup>15</sup> Testimony of James Blundell, transcript no. 2, pages 90 and 91.

44. Ms. Fischhaber, on behalf of Staff, recommends that the Commission:
- (1) Revoke all ETC and EP designations of Western Wireless.
  - (2) If the Commission does not revoke the ETC and EP designations of Western Wireless the Commission send a copy of the record in the instant proceeding to the Federal Communications Commission and the Universal Service Administrative Company recommending that Western Wireless be ordered to make reparations by paying back all of the high cost funding it has received.
  - (3) If the Commission revokes Western Wireless' ETC and EP designations, the Commission should consider sending a copy of its order and information for Staff to contact other state commissions in states where Western Wireless has been designated as an ETC.
  - (4) The Commission should send a copy of the record in this proceeding to the Colorado State Attorney General's Office, with a request to investigate misleading and deceptive business practices.

45. James Blundell, Executive Director of External Affairs for Western Wireless testified that Western Wireless is committed to making the \$14.99 BUS offering available to customers. Mr. Blundell acknowledged that Western Wireless made in effect a compliance filing with the Commission on November 8, 2002 (Exhibit No. 30). The filing identified the rates, terms, and conditions of the \$14.99 BUS offering and it also describes areas of the state where the offering was available. Mr. Blundell testified that since the filing is available to the public at the Commission, Western Wireless considers it to provide notice to the public of the availability of the \$14.99 BUS offering.

46. Mr. Blundell testified that the \$14.99 BUS offering was available to consumers after the filing on November 8, 2002. He stated that a customer could ask for the offering at a CellularOne retail store or by telephone. He stated that if a sales representative was not familiar

with the offering, a customer could “escalate” the request to the regulatory group at the corporate headquarters where steps could be taken to provide the service.<sup>16</sup>

47. Mr. Blundell stated that Western Wireless advertises its services through radio, TV, newspapers, direct mail, and website advertising. He does not believe that there is any legal requirement to advertise a specific service or offering.

48. Mr. Blundell testified that the Einstein System, an internet service provisioning system that is available to Western Wireless employees to check on rate plans, coverage, and other matters, did not display the \$14.99 BUS Plan until 2004. Upon discovery of the absence of the plan on the system, Western Wireless placed the plan on the system<sup>17</sup> and the company printed the \$14.99 BUS brochures.<sup>18</sup> Arrangements were made to deliver the brochures to Colorado CellularOne retail stores.

49. Mr. Blundell checked selected CellularOne retail stores in Colorado in January of 2005 to determine whether he would be able to order the \$14.99 BUS Plan. He called one of the stores in Pueblo, the Salida store, and the Canon City store. The sales representatives in two out of three of the stores were aware of the plan. All of the sales representatives told him to call the 800 number for service.

50. Mr. Blundell testified that Western Wireless uses Universal Service support funds to expand and improve Western Wireless’ network infrastructure for the benefit of its Colorado customers.

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<sup>16</sup> Transcript no. 2, pages 34 and 35.

<sup>17</sup> Exhibit No. 32.

<sup>18</sup> Exhibit No. 33.

51. Mr. Blundell testified that Western Wireless has received support funds as indicated in Confidential Exhibit No. 14, however, Western Wireless has not applied for, nor received any state support funds in Colorado.

52. In regard to advertising, Mr. Blundell states that Western Wireless does advertise and he believes that its Colorado advertising is in compliance with § 214(e) of the Act. Western Wireless believes that the advertising requirement requires that a carrier generally advertise in the areas that it serves. It does not believe that the Act requires Western Wireless to advertise every rate plan.

### **III. DISCUSSION/CONCLUSIONS**

53. The evidence of record establishes that CTA has met its burden of proof by establishing that Western Wireless has violated the terms of the Stipulation and Settlement Agreement approved by the Commission in Docket No. 00K-255T.

54. The evidence further establishes that the major factor in obtaining Commission approval for the designation of Western Wireless as an ETC and EP, eligible to collect support funds, was the commitment of Western Wireless to offer a \$14.99 BUS Plan and to advertise its existence.

55. By the terms of the Stipulation, Western Wireless was to offer and advertise its \$14.99 BUS Plan on the date of compliance filing with the Commission starting on November 8, 2002. (Exhibit No. 30) There exists overwhelming and credible evidence to establish that Western Wireless violated the Stipulation by not having the \$14.99 BUS Plan available for provisioning to Colorado customers for the period of November 8, 2002 through March 23, 2004. The testimony of witnesses Parker, Brown, Anderson, and Fischhaber establishes that the BUS offering was not available until March, 2004 approximately 16 months after Western



Wireless made the commitment to provide the service. These witnesses have established that most of the Western Wireless representatives contacted by the witnesses were unaware of the offering after repeated inquiries. In addition, Western Wireless did not advertise the offering until March 2004 at which time it provided some of its branded retail stores with brochures. Even then, these brochures were not displayed in the stores but rather were located out of view of a customer who entered the CellularOne stores and authorized agent stores. The brochures were not available at all of the stores.

56. It was not until March of 2004, that Western Wireless placed the \$14.99 BUS Plan on its Einstein ordering system to allow the proper provisioning of the plan for an interested customer. Thus it is clear that a customer who wanted the \$14.99 BUS Plan had no reasonable way of knowing of the offering before March, 2004, and even if the customer asked for the lowest local calling rate plan in the retail stores, the customer was offered a plan of \$30 or more by sales representatives who themselves were unaware of the offering.

57. Although Western Wireless contends that the offering was available, and that it was advertised, the evidence shows otherwise. It is significant that as of the dates of the hearing in the instant docket, no customer has opted to order the \$14.99 BUS Plan.

58. Western Wireless as an ETC and EP has the obligation by the terms of the Stipulation and the Act, 47 U.S.C. §§ 214(e), 254(e), 47 C.F.R., §§ 54.01, 54.201, and this Commission's rules, 4 CCR 723-42-7 to offer and to advertise the plan.

59. The evidence of record establishes that even though Western Wireless did not offer and advertise the plan as it committed to do under the terms of the Stipulation, it received federal support funds starting in October 2002 as shown in Confidential Exhibit No. 14.

60. It is found and concluded that Western Wireless violated the Stipulation from November 8, 2002 through March 23, 2004. The record clearly supports the conclusion that Western Wireless violated the Stipulation and therefore Western Wireless should be sanctioned by this Commission.

61. The record is less clear as to whether Western Wireless violated federal and state law to justify the remedy of revocation advocated by CTA, Staff, and OCC. Although as an ETC and EP, Western Wireless has obligations to offer and advertise local calling plans in order to receive support, it is not clear from the factual record that a violation of law occurred. The evidence does support the fact that Western Wireless offers and advertises various local universal calling plans that could qualify for high cost support.

62. Pursuant to § 40-6-109(2), C.R.S., it is recommended the Commission enter the following order.

#### **IV. ORDER**

##### **A. The Commission Orders That:**

1. Western Wireless shall, if it has not done so, immediately offer and provision the \$14.99 Basic Universal Service (BUS) Plan.

2. Western Wireless shall immediately advertise the availability of its \$14.99 BUS Plan in the media of general distribution and prominently display the offering and charges in its retail stores. This shall include, but not be limited to, advertising in the telephone directory "guide pages" in the designated areas as well as advertising on Western Wireless' web site.

3. Western Wireless shall report the BUS "take rate" information including documentation of actual customer purchases to Staff of the Colorado Public Utilities Commission and the Office of Consumer Counsel on a quarterly basis.

4. Western Wireless shall immediately initiate training programs for its retail employees to familiarize all employees with the existence of the plan.

5. As a sanction, Western Wireless, in consultation with the Colorado Telecommunications Association, Staff of the Public Utilities Commission, and the Colorado Office of Consumer Counsel, shall file with the Commission a plan for reparations to its Colorado customers with the Commission within 60 days of the effective date of this Order. The plan for reparations shall cover the period of November 8, 2002 to March 23, 2004.

6. Western Wireless shall not recover state high cost funds to which it may have been entitled as an Eligible Provider from November 2002 through March, 2004.

7. Western Wireless' Motion to Dismiss is denied.

8. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

9. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

10. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Administrative Law Judge

Attachment 2

Colorado Decision C05-1378

Order Granting Exceptions In Part

Mailed Date: November 22, 2005

Decision No. C05-1378

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 04F-474T

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IN THE MATTER OF THE COMPLAINT BY THE COLORADO TELECOMMUNICATIONS  
ASSOCIATION AGAINST WESTERN WIRELESS HOLDING COMPANY, INC.

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**ORDER GRANTING EXCEPTIONS IN PART**

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Mailed Date: November 22, 2005

Adopted Date: October 5, 2005

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**I. BY THE COMMISSION****A. Statement**

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R05-0988 (Recommended Decision) filed by the Colorado Telecommunications Association (CTA), the Colorado Office of Consumer Counsel (OCC), and Commission Staff (Staff) (collectively, Joint Exceptors); and Western Wireless Holding Company (Western Wireless). Now, being fully advised in the matter, we grant the Joint Exceptors' exceptions in part consistent with the discussion below.

**B. Background**

2. On September 17, 2004, CTA filed a complaint against Western Wireless alleging that Western Wireless, as a telecommunications provider designated by this Commission as an Eligible Telecommunications Carrier (ETC) and Eligible Provider (EP), violated the terms of the commitments it made in order to receive such designation. CTA alleges that certain commitments were made in a Stipulation approved by the Commission in consolidated Docket No. 00K-255T, Decision Nos. R01-19, C01-476, and C01-629.<sup>1</sup> The ETC designation made Western Wireless eligible to receive Federal Universal Support Funds (USF), and the designation of Western Wireless as an EP provided eligibility to receive Colorado High Cost Support Mechanism Funds.

3. More specifically, CTA alleges that Western Wireless violated the approved Stipulation by failing to offer a Basic Universal Service (BUS) Plan for \$14.99 in its designated service areas.

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<sup>1</sup> Hearing Exhibits 3A, 3B, and 3C.

4. Western Wireless agreed in the Stipulation to offer its BUS for \$14.99 “. . . as a wireless application based on its existing mobile cellular service in Colorado.”<sup>2</sup> The service would use a mobile customer premises unit that a customer would buy or lease. The approximate size of the unit is that of a laptop computer, into which a customer would plug a telephone, facsimile machine, or modem. Western Wireless agreed to make its BUS offering to the public in its designated service areas upon completing its compliance filing with the Commission.<sup>3</sup>

5. Western Wireless made its compliance filing with the Commission on November 8, 2002, thus holding itself out to offer its \$14.99 BUS Plan starting on that date.

6. Western Wireless also made a commitment in the Stipulation to “advertise the availability of [the BUS offering] and charges using media of general distribution in accordance with federal and state requirements.”<sup>4</sup>

7. The parties to the Stipulation, Western Wireless, the OCC, and Staff agreed and stated as part of the executed Stipulation that this Commission has the authority to enforce compliance with the Stipulation.<sup>5</sup>

8. CTA's Complaint requests that the Commission enforce the Commission-approved Stipulation and take various remedial actions against Western Wireless, including: 1) revocation of Western Wireless' ETC and EP designations; 2) requiring an accounting and restitution by Western Wireless of all support funds received during the entire period during which Western Wireless had ETC and EP status pursuant to the Commission's orders; and

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<sup>2</sup> Stipulation, Hearing Exhibit 3C, page 5, ¶ 3.

<sup>3</sup> Stipulation, Hearing Exhibit 3C, page 12, ¶ A.

<sup>4</sup> Stipulation, Hearing Exhibit 3C, page 5, ¶ 4.

<sup>5</sup> Stipulation, Hearing Exhibit 3C, page 12, ¶ C.



3) Commission review and initiation of an appropriate action regarding annual certification affidavits of Western Wireless that ETC and EP support funds received were used for the required purposes.

9. Staff and the OCC intervened in this Complaint docket stating, among other things, that they were concerned with the issues raised in the Complaint, the effect on the public interest, the regulatory process, and the support funds.

10. This matter was heard by an Administrative Law Judge (ALJ) on March 7 and 8, 2005.

11. The ALJ issued Recommended Decision, R05-0988, on August 16, 2005. In the Recommended Decision, the ALJ found that CTA had met its burden of proof by establishing that Western Wireless violated the terms of the Stipulation approved by the Commission.

12. Further, the ALJ found that the evidence established that the major factor in the Commission's approval of the Stipulation, and therefore the designation of Western Wireless as an ETC and an EP, was the commitment of Western Wireless to offer a \$14.99 BUS Plan and to advertise its existence.

13. The ALJ found that the violation of the Stipulation occurred from November 8, 2002, the date Western Wireless held itself out as a provider of the BUS service, through March 23, 2004, the date the BUS Plan was actually entered into its "Einstein" ordering system. The ALJ stated that it is less clear as to whether Western Wireless violated federal and state law to justify the remedy of revocation of its ETC/EP status as advocated by CTA, Staff, and the OCC.

14. As a result, the ALJ ordered Western Wireless to immediately offer, provision, and advertise the \$14.99 BUS Plan. The ALJ further ordered Western Wireless to initiate training programs for its retail employees regarding the existence of the BUS Plan, and to report the BUS "take-rate" information to the Staff.

15. In addition, the ALJ ordered Western Wireless, in consultation with Staff, CTA, and the OCC, to file with the Commission, a plan for reparations to its Colorado customers within 60 days of the Recommended Decision. The plan for the reparations was to cover the period November 8, 2002 through March 23, 2004.

**C. Exceptions**

16. We now address the Exceptions to this Recommended Decision filed jointly by CTA, Staff, and the OCC (Joint Exceptions) and by Western Wireless on September 6, 2005.<sup>6</sup>

17. The Joint Exceptors state in their filing that they believe the ALJ's decision is thoughtful, well-reasoned, and supported by the record. However, the Joint Exceptors raise three issues related to the Recommended Decision that they wish the Commission to address.

18. First, the Joint Exceptors, while generally supportive of the reparations concept suggested in the Recommended Decision, nonetheless argue that the evidence and nature of the harm visited by Western Wireless' conduct on Colorado consumers, the regulatory process, the wireless carrier's wireline competitors, and the federal USF status all militate in favor of a revocation of Western Wireless' federal ETC status. The Joint Exceptors also continue to be supportive of Staff's recommendation in the docket that, if Western Wireless' ETC status is not

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<sup>6</sup> Responses to the exceptions were also filed by the Joint Exceptors and Western Wireless on September 20, 2005.

revoked, a copy of the record should be provided to the Federal Communications Commission (FCC) and the Universal Service Administrative Center (USAC) accompanied by a recommendation that Western Wireless be ordered to repay the federal USF it improperly received.

19. Should the Commission uphold the ALJ's decision to impose reparations on Western Wireless, the Joint Exceptors request that the Commission provide the parties with more detail as to what the reparation plan should include. As part of that request, the Joint Exceptors also request the Commission find that three categories of harm exist: 1) harm to the telecommunications consumers of Colorado; 2) harm to the regulatory process; and 3) harm to other providers operating in the subject serving areas.

20. Secondly, the Joint Exceptors ask the Commission to find that the dates of Western Wireless' non-compliance were November 8, 2002 through March 7, 2005 rather than March 23, 2004. The Joint Exceptors state that the mere act of placing the BUS offering in its internal ordering system does not indicate that the BUS was offered or available to the consuming public. According to the Joint Exceptors, three witnesses testified that during the fall of 2004 the BUS product was not being advertised and was not available when they tried to order it through Cellular One retail outlets and the 1-800 Cellular One telephone number.

21. The Joint Exceptors point to evidence in the record that supports their position that, not only did Western Wireless fail to advertise the BUS offering during this 28-month period, it concealed the advertising brochures from customers.<sup>7</sup> Even as of January 2005, evidence in the record indicates that Western Wireless' retail sales personnel were unaware of the

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<sup>7</sup> See Hearing Exhibit 7, series of internal emails.

BUS product and training sessions on this offering that were discussed in internal emails.<sup>8</sup> For these reasons, the Joint Exceptors urge acknowledgement by the Commission that the hearing date of March 7, 2005 is the appropriate end date both for Western Wireless' violation of the terms and conditions of the Stipulation and for any approved and accepted plan of reparations.

22. Finally, the Joint Exceptors ask the Commission to find that Western Wireless not only violated the Stipulation by failing to advertise the \$14.99 BUS offering, but violated federal and state law as well. The Joint Exceptors cite § 214(e)(1)(B) of the Telecommunications Act of 1996 (Telecom Act) that requires ETCs to "advertise the availability of such services and the charges therefore using media of general distribution." The Joint Exceptors believe that it is clear from reading this statute that carriers may only receive universal service support by advertising the availability of and charges for its universal service offerings. This section does not allow an ETC to advertise only certain plans, yet receive support for all its plans, according to the Joint Exceptors. They conclude that the record clearly shows Western Wireless was not advertising the availability of and charges for the \$14.99 BUS offering through the date of hearing, March 7, 2005.

23. Further, the Joint Exceptors argue that Colorado law requires an ETC to meet the requirements of § 214(e)(1)(B), advertise in publications targeted to the general residential market, and place advertisements in the telephone book.<sup>9</sup> The Joint Exceptors conclude that Western Wireless violated Colorado law for the same reasons it violated federal law.

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<sup>8</sup> See Hearing Exhibit 36, series of internal emails.

<sup>9</sup> See Hearing Exhibit 11, 4 *Code of Colorado Regulations* 723-42-7.2.6.

24. In its exceptions, Western Wireless contends that this matter should be dismissed on jurisdictional grounds because Western Wireless is not a public utility subject to complaint proceedings under 4 *Code of Colorado Regulations* (CCR) 723-1-61(b). According to Western Wireless, because it is not a public utility, the Commission is not authorized to adjudicate a complaint against Western Wireless. Western Wireless recognizes that the ALJ twice denied its Motion to Dismiss this proceeding on jurisdictional grounds, holding that Western Wireless accepted the Commission's jurisdiction by applying for and stipulating to receive ETC designation. However, Western Wireless asks the Commission to reverse this finding and dismiss the complaint.

25. Western Wireless also argues that the \$14.99 BUS Plan was available for purchase and would have been provisioned between November 2002 and March 2004, had a customer requested it. Western Wireless asserts that the November 2002 compliance filing identified the BUS offering at the rate of \$14.99, the areas where the plan was available, and the applicable local calling areas. According to Western Wireless, this filing put the public on notice of the availability of the BUS offering. In discussing this filing, Western Wireless quotes the filed rate doctrine, stating that it "gives each customer official notice what the charge will be if he selects this or that product or service." Western Wireless states that the Commission should find that its filing of Agreement Letter No. 1 made the BUS Plan available and justifies dismissal of the complaint.

26. Further, Western Wireless notes that Mr. James Blundell, who testified on behalf of the company, explained that, even though the BUS offering was not entered in the "Einstein" ordering system until March 2004, if a customer had advised a representative that he wished to

buy the BUS Plan, the representative would have escalated that request within the sales department which would have directed the request to the regulatory department to be provisioned. Further, Mr. Blundell stated that to his knowledge the company had never refused to provision the BUS Plan to a requesting customer.

27. Western Wireless also takes exception to the ALJ's conclusions regarding advertising. Western Wireless believes that as an ETC it is not obligated to run specific advertisements for the BUS Plan. Western Wireless maintains the Complaint did not allege a violation of advertising standards. The word advertise, according to Western Wireless, cannot even be found in the original Complaint. According to Western Wireless, when Staff and the OCC intervened, they did not join the case as co-complainants as would be required for them to make additional independent allegations.

28. Western Wireless also contends that § 214(e)(1) does not require all offerings to be specifically advertised. It cites the *Universal Service Order*,<sup>10</sup> where the FCC chose not to impose specific advertising standards, finding that "no additional measures are necessary to implement the advertising requirement of § 214(e)(1)" beyond the terms of the statute itself. Further, in the *Virginia Cellular Order*, the FCC has reasoned that "because an ETC receives universal service support only to the extent that it serves customers, we believe that strong economic incentives exist, in addition to the statutory obligation, for an ETC to advertise its universal service offering in its designated area."<sup>11</sup>

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<sup>10</sup> *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶¶ 128, 130 (rel. May 8, 1997) ("*Universal Service Order*").

<sup>11</sup> *Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338, ¶ 25 (rel. January 22, 2004) ("*Virginia Cellular Order*").

29. Western Wireless takes the position that the Commission should find § 214(e)(1) does not require ETCs to specifically advertise each service offering that qualifies for universal service support. According to Western Wireless, neither Colorado law nor the Stipulation require Western Wireless to specifically advertise its BUS offering.

30. Western Wireless also maintains that, regardless of the past dispute on this issue, Western Wireless has now responded to Staff's concerns and eliminated those concerns over this issue on a going-forward basis.

31. Finally, Western Wireless takes issue with the Recommended Decision to impose a reparations scheme. Western Wireless states that this finding of necessary reparations is contrary to law and unsupported by facts in this case. By Western Wireless' reasoning, the Recommended Decision provides no statutory authority for its proposed reparations remedy and neither CTA nor the intervenors proposed that reparations be awarded. Further, Western Wireless contends that state statutes<sup>12</sup> do not authorize the Commission to award reparations in this case, because: 1) the complaint must be filed against a public utility; 2) reparations can only be awarded in favor of a complainant – in this case CTA who has alleged no damages; 3) Congress has expressly preempted states from regulating cellular providers' rates; and 4) the statute only allows for reparations when a rate charged was excessive or discriminatory.

32. Therefore, Western Wireless requests that the Commission eliminate the reparations provision in the Recommended Decision.

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<sup>12</sup> See *Colorado Revised Statutes* § 40-6-119(1), C.R.S.

**D. Discussion and Conclusions****1. Jurisdiction**

33. The initial issue to be determined is the Commission's jurisdiction regarding this complaint. Western Wireless argues that we should dismiss the complaint because it is not a "public utility" subject to complaint proceedings under 4 CCR 723-1-61(b) and § 40-6-108, C.R.S. According to Western Wireless, since it is not a public utility, the Commission is not authorized to adjudicate a complaint against Western Wireless.

34. While it is true that the Stipulation Western Wireless entered into to receive ETC designation provides that this Commission has authority to enforce the terms of the Stipulation, we find that, more importantly, this Commission derives its authority to make a determination in this matter directly from federal law. 47 U.S.C. § 214(e)(2) of the Telecom Act gives state commissions the primary responsibility for determining ETC designations. That section provides that a "State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission."

35. States are to use the annual certification process for all ETCs to ensure that federal universal service support is used to provide the supported services and for associated infrastructure costs.<sup>13</sup> Additionally, it has always been anticipated that state commissions would take the appropriate steps to account for the receipt of high-cost support and ensure that federal

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<sup>13</sup> See *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96045, FCC 04J-1, released February 27, 2004 para. 48 (*Federal-State Joint Board on Universal Service*), citing *Federal-State Joint Board on Universal Service*, Ninth Report and Order and Eighteenth Order on Reconsideration, CC Docket No. 96-45, 14 FCC Rcd 20432, 20482-83, para. 95 (1999).



support is being applied in a manner consistent with 47 U.S.C. § 254.<sup>14</sup> “Where an ETC fails to comply with requirements proposed by the state commission, the state commission may decline to grant an annual certification or may rescind a certification granted previously.”<sup>15</sup> It is clear that state commissions have the authority to ensure that an ETC receiving federal universal support is using that support to meet the requirements of 47 U.S.C. § 254(e), as well as to ensure that the ETC has received and is using the support pursuant to its § 254(e) obligations. Therefore, we find that this Commission has jurisdiction to hear and rule on this matter.

## 2. Sufficiency of Complaint

36. Western Wireless takes exception to the finding in the Recommended Decision that it failed to advertise the \$14.99 BUS Plan as required. According to Western Wireless, the Complaint in this case failed to allege any violation of advertising standards, only that it was not offering the \$14.99 BUS offering in the Colorado Marketplace. Western Wireless cites Commission Rule 4 CCR 723-1-61(a) which requires that a formal complaint satisfy the pleading standards of 4 CCR 723-1-22, which in turn requires that a complaint must include, among other things, “a clear and concise statement of the matters relied upon as a basis for the pleadings.” 4 CCR 723-1-22(d)(2). As such, Western Wireless argues that the Commission should hold CTA to its pleading as required by Colorado law and eliminate any finding in the Recommended Decision that Western Wireless violated advertising requirements.

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<sup>14</sup> See Report and Order in CC Docket No. 00-256, 16 FCC Rcd at 11317-18, para. 187 (2001) (*Rural Task Force Order*).

<sup>15</sup> *Federal-State Joint Board on Universal Service*, FCC 04J-1, para. 48, citing *Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, CC Docket No. 96-45, 15 FCC Rcd 15168 (2000), 15174, para. 15.

37. On the other hand, the Joint Exceptors take the position that, under Colorado law, a complaint is sufficient if it contains a short and plain statement of the claim showing that the pleader is entitled to relief.<sup>16</sup> Joint Exceptors also cite 4 CCR 723-1-61(a), which provides that a formal complaint is required to set forth sufficient facts and information to adequately advise the respondent public utility and the Commission of how any law, order, Commission rule, or public utility tariff provision has been violated. Under the notice pleading standards followed in Colorado, Joint Exceptors argue that the Complaint contained sufficient information in which to allege that Western Wireless failed to advertise its \$14.99 BUS offering.

38. A review of the Complaint illustrates that CTA did indeed provide sufficient information to advise Western Wireless that federal law had been violated by its failure to advertise the \$14.99 BUS offering. For example, at paragraph number 9 of the Complaint, CTA indicates that Ms. Patricia Parker's pre-filed Answer Testimony on behalf of the OCC addressed Western Wireless' failure to advertise the BUS offering. In relevant part, that paragraph states that "...she noted that WW had failed to provide any evidence of advertising or marketing efforts to make potential customers aware of the \$14.99 BUS offering." Additionally, at paragraph number 11 of the Complaint, CTA states that "WW continues to fail to meet its WW1 Stipulation commitments. As the accompanying testimony of Mr. Brown indicates, the 'affordable' WW \$14.99 BUS offering is simply unavailable to Colorado consumers." We find that the Complaint provided sufficient information of Western Wireless' alleged failure to advertise its \$14.99 BUS offering and that Western Wireless was or should have been on notice that a failure to advertise was an allegation of the Complaint.

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<sup>16</sup> Citing, *Elliot v. Colorado Dept. of Corrections*, 865 P.2d 859 (Colo. App. 1993).

### 3. Requirement to Advertise

39. Western Wireless maintains that § 214(e) of the Telecom Act does not require all offerings to be specifically advertised. Rather, Western Wireless maintains that § 214(e) merely states very generally that ETCs must advertise the availability of services and charges in media of general distribution. Such language, according to Western Wireless does not require that every service offering must be separately advertised. Additionally, Western Wireless argues that state law does not require that ETCs advertise specific service offerings, nor does the Stipulation require it to specifically advertise every offering that is available.

40. We find Western Wireless' arguments unavailing here. The language of § 214(e)(1) is unambiguous. It states in relevant part: "... a common carrier designated as an eligible telecommunications carrier ... shall be eligible to receive universal service support in accordance with section 254 of this title and *shall*, throughout the service area for which the designation is received – (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title ... and (B) advertise the availability of such services and the charges therefore using media of general distribution." *Id.* (emphasis supplied). It is clear that an ETC must advertise the services it offers that are supported by Federal universal service support mechanisms. The \$14.99 BUS offering at issue is one of those supported services. As such, we find that Western Wireless was required to advertise the availability of that service and the charge for that service. We are unaware of any FCC directive or statement to the contrary that gives an ETC the discretion whether to advertise a service supported by a Federal universal service support mechanism. We deny Western Wireless' exceptions on this point.

41. Western Wireless argues that its compliance filing on November 8, 2002 that included a list of the rates, terms, and conditions for the \$14.99 BUS Plan and the areas it was

available, put the Commission and members of the public on notice of the availability of the plan. Consequently, Western Wireless contends that no other advertising was necessary. In support of its argument, Western Wireless invokes the filed rate doctrine, which provides that a utility's filed rate is the lawful rate.

42. We fail to see the relevance of the filed rate doctrine in regard to the allegation that Western Wireless failed to advertise the \$14.99 BUS Plan. The lawfulness of a utility's filed rate has nothing to do with the requirement under § 214(e)(1)(B) for a carrier such as Western Wireless to advertise the availability of its services that are supported by federal universal service support mechanisms. A nexus between the statutory requirement and the filed rate doctrine simply does not exist as regards an ETC's advertising responsibilities. Therefore, we deny Western Wireless' exceptions here.

43. Further, we agree with the Joint Exceptors that the time period for this violation should run from November 8, 2002 through March 7, 2005, and not end on March 23, 2004 as ordered by the ALJ. There is ample evidence in this record, including the testimony of three witnesses, as well as internal Western Wireless e-mails that indicate BUS brochures should not be displayed. Additionally, the BUS product was not on Western Wireless' website until March 2005. This indicates that Western Wireless failed to offer or advertise the BUS product until the commencement of the hearing on this matter. At the very least, we find that Western Wireless was in violation of the public interest portion of the Stipulation approved by this Commission for the total 28 months by not offering or advertising the product. As discussed above, it is also probable that Western Wireless was in violation of federal law as well. We defer

to the FCC for a determination as to whether Western Wireless was required by federal law specifically to advertise its BUS offering in order to receive support funds.

44. The appropriate remedy for Western Wireless' failure to offer and advertise the \$14.99 Bus Plan requires consideration of not only the appropriate measures to ensure such non-compliance does not occur in the future, but also a consideration of the public interest relating to those rural customers possibly affected by this outcome. While the Federal-State Joint Board on Universal Service has indicated that a state commission may decline to grant an annual certification or rescind a certification previously granted (*see, Federal-State Joint Board on Universal Service*, FCC 04J-1, para. 48 *supra*), we are hesitant to rescind Western Wireless' ETC status at this time, fearing unintended consequences to those rural customers who now rely on Western Wireless for their telecommunications needs.<sup>17</sup>

45. However, we also agree with Western Wireless that reparations to Colorado consumers are not an appropriate remedy for these violations. A reparation plan, including determining the amount, the recipients and method of disbursement would be difficult at best to determine, and does not mitigate the harm to the federal fund itself nor to the violations of the regulatory process. Additionally, it is not clear to us that reparations pursuant to § 40-6-119, C.R.S., may be awarded in any case. Reparations under this section require a finding that a public utility has charged an excessive or discriminatory amount for a product, commodity, or service. As a wireless carrier, federal law is clear that we do not have jurisdiction over such a carrier's rates. Therefore, we find that reparations are not appropriate in this instance.

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<sup>17</sup> We also note that Western Wireless' expenditures of its ETC money are not at issue. Staff has indicated, and we have forwarded a report to the FCC that Western Wireless has expended its ETC funds in an appropriate manner and therefore recommended that it be certified for 2006.

46. Therefore, we find that it is more appropriate to forward our findings here to the FCC, and the USAC, along with the complete record of the matter for a determination as to whether Western Wireless should be required to return ETC funds it received during the period which it failed to offer or advertise its \$14.99 BUS Plan, and if so, in what amount. We find that this Commission does not possess the authority to render such a remedy; however, the FCC clearly has such authority. We trust that the FCC, in its discretion, will make an appropriate determination under the facts and circumstances of this case. We shall include an affidavit of our findings here along with the record.

## II. ORDER

### A. The Commission Orders That:

1. The Joint Exceptions filed by Commission Staff, the Office of Consumer Counsel, and the Colorado Telecommunications Association are granted in part, and denied in part, consistent with the above discussion.

2. The Exceptions filed by WWC Holding Company, Inc. are granted in part, and denied in part, consistent with the above discussion.

3. The Motion for Leave to Present Oral Argument on Exceptions filed by WWC Holding Company, Inc. is denied.

4. The record of this docket and this instant order shall be forwarded to the Federal Communications Commission and to the Universal Service Administrative Center with a request for review and disposition, consistent with the above discussion.

5. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an Application for Rehearing, Reargument, or Reconsideration shall begin on the first day after the Commission mails or serves this Order.

6. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
October 5, 2005.**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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\_\_\_\_\_  
Commissioners

CHAIRMAN GREGORY E. SOPKIN  
SPECIALLY CONCURRING.

**III. CHAIRMAN GREGORY E. SOPKIN SPECIALLY CONCURRING:**

1. I agree with the decision above in all particulars except as noted below. I would find that Western Wireless Holding Company (Western Wireless) was required to advertise the availability of its a Basic Universal Service (BUS) offering at *whatever* price it was offered. The Commission has no authority to require the BUS offering to be priced at an "affordable" rate, or at \$14.99. *See* 47 U.S.C. § 332(c)(3); *see also* Commission Decision No. C04-0545 (Sopkin, Dissenting), in Docket No. 03A-061T. Since Western Wireless did not advertise in any respect –

price or otherwise – the availability of its BUS offering, it violated federal statute and the Stipulation.

2. I also would find that Western Wireless did not offer or advertise the BUS product from November 8, 2002 through March 23, 2004, and continued not to advertise the BUS product until March 7, 2005. However, in my view, the BUS product was "offered" as of March 23, 2004, the date the BUS Plan was entered into the "Einstein" ordering system.<sup>18</sup> This minor disagreement does not change the fact that the failure to advertise and offer the BUS product for the dates described was a breach of the Stipulation and violation of federal law.

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Chairman

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<sup>18</sup> To "offer" the service in question is not defined by federal statute. To "offer" the service must be different than to "advertise" it, otherwise there would be no need to enumerate the two separate requirements. *See* 47 U.S.C. §§ 214(e)(1)(A) and (B); *Cacioppo v. Eagle Cty. School Dist.*, 92 P.3d 453, 463 (Colo. 2004) (every statutory word and term should be given meaning). A loose definition of "offer" would suggest the ability of a customer to actually order and receive the subject product. Since this could occur when the BUS offering was entered into the "Einstein" ordering system, I would find that the offering occurred as of March 23, 2004. However, I hasten to add that this is a close question, and the FCC is given deference in interpreting the Telecommunications Act. Thus, I would readily defer to the FCC's judgment on this issue, as well as the suitable remedy for the entirety of this matter.



Attachment 3

United States District Court  
For The District Of Colorado  
Civil Action No. 04-cv-01682-RPM

Memorandum Opinion And Order  
Judgement

March 8, 2006

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Senior District Judge Richard P. Matsch

Civil Action No. 04-cv-01682-RPM

WWC HOLDING CO., INC.,

Plaintiff,

v.

GREGORY E. SOPKIN,  
POLLY E. PAGE, and  
CARL MILLER,  
in their Official Capacities as the Commissioners of the  
Public Utilities Commission of the State of Colorado,

Defendants.

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MEMORANDUM OPINION AND ORDER

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Matsch, Senior Judge

The plaintiff WWC Holding Co., Inc. ("Western Wireless"), a wireless telecommunications services provider, seeks declaratory and injunctive relief against the defendants, Commissioners of the Public Utilities Commission of Colorado ("Commission"), for imposing conditions to granting Western Wireless' application to be designated as an "eligible telecommunications carrier" ("ETC") under the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* ("Act"). The defendants are the individual Commissioners sued only in their official capacities on claims that the conditions imposed are preempted under the Act (Counts I-IV), violate Federal statutory and constitutional law for which the plaintiff seeks a remedy under 42 U.S.C. § 1983 (Count V), and exceed statutory authority granted under C.R.S. §§ 40-1-103 &

40-15-401 (Count VI). Subject matter jurisdiction for Counts I through V is claimed and found pursuant to 28 U.S.C. §§ 1331, 1337, and 1343(a) and Count VI pursuant to 28 U.S.C. § 1367. The plaintiff filed a motion for summary judgment on January 10, 2005. From the papers submitted and the January 17, 2006 hearing, the factual context giving rise to the legal questions presented is not in dispute.

### Background

The Telecommunications Act of 1996, which amended the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, was enacted “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996). *See also Qwest Corp. v. F.C.C.*, 258 F.3d 1191, 1196 (10<sup>th</sup> Cir. 2001). Affordable, quality telecommunications services for all Americans are referred to as “universal service” and include, among other services, local telephone service and access to emergency, directory-assistance, and long-distance services. 47 U.S.C. § 254(c); 47 C.F.R. § 54.101; *Qwest Commun. Intern., Inc. v. F.C.C.*, 398 F.3d 1222, 1226 (10<sup>th</sup> Cir. 2005); *Qwest Corp. v. F.C.C.*, *supra* at 1195.

To make universal service available to all users, including customers in rural, insular, and high cost areas, the Act created an explicit funding mechanism.<sup>1</sup> Unless exempt, every telecommunications carrier providing interstate telecommunications services must contribute to a

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<sup>1</sup>Previously, universal service was achieved through explicit payments and implicit subsidies such as geographic rate averaging. By averaging local telephone rates across the state, “high-density (urban) areas, where costs are typically lower, subsidize low-density (rural) areas.” *In the Matter of Federal-State Joint Bd. on Univ. Serv.*, Report and Order, 12 F.C.C.R. 8776, 8784 (1997).

Federal Universal Service Fund ("USF") to support universal service. 47 U.S.C. §§ 254(d) & (e). The Universal Service Administrative Company ("USAC") bills contributors, collects contributions, and disburses universal service support funds. 47 C.F.R. § 54.702. Contributions from telecommunications carriers are determined by the USAC using a quarterly contribution factor calculated by the FCC.<sup>2</sup> 47 C.F.R. § 54.709. Subject to a certain limit, these carriers, in turn, may recover their contribution costs through charges to end users, and may do so through a line item on a customer's bill. 47 C.F.R. § 54.712.

Support from the USF to provide service for high-cost consumers is available to a common carrier who is designated as an "eligible telecommunications carrier" ("ETC") in the service area for which the designation is received. 47 U.S.C. §§ 254(e) & 214(e). Common carriers subject to the jurisdiction of a state commission are designated as ETCs by that state commission under 47 U.S.C. § 214(e)(2) while common carriers who are not subject to the jurisdiction of a state commission are designated as ETCs by the FCC under 47 U.S.C. § 214(e)(6).

The requirements for ETC designation in a requested service area are met if the applicant: 1) is a common carrier; 2) can offer each of the designated services identified in 47 C.F.R. § 54.101; and 3) will advertise its services. 47 U.S.C. § 214(e). To serve an area already served by a rural telephone company, the designation of the applicant as an ETC must serve the "public interest." *Id.* The "service area" is the geographic area established by a state commission or the

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<sup>2</sup>Generally, the quarterly contribution factor is calculated "based on the ratio of total projected quarterly expenses of the universal service support mechanisms to the contributors' total projected collected end-user interstate and international telecommunications revenues, net of projected contributions." 47 C.F.R. § 54.709.

FCC, as the case may be, where the ETC is required to comply with universal service obligations and is eligible to receive universal service support. 47 U.S.C. § 214(e)(5). Generally, in an area served by a rural telephone company, it means the rural company's "study area," the area used by the FCC to determine support for rural telephone companies. 47 U.S.C. § 214(e)(5).

The Federal universal service support funds can only be used "for the provision, maintenance, and upgrading of facilities and services" in the service area where the carrier is designated as an ETC and state commissions must file an annual certification to that effect. 47 U.S.C. § 254(e); 47 C.F.R. §§ 54.313 & 54.314. Competitive ETCs serving the service area of an incumbent local exchange carrier ("ILEC") receive the same per-line amount of support that the ILEC would receive for serving the same customer.<sup>3</sup> 47 C.F.R. § 54.307. Currently, non-rural carriers' support is based on a forward-looking economic cost model of providing services designated for universal service support while rural carriers' support is based on their embedded or historical costs. Kathleen Q. Abernathy, 3 *J. Telecom. & High Tech. L.* 409, 415-416 (2005); *In the Matter of Federal-State Joint Bd. on Univ. Serv.*, Report and Order, 12 F.C.C.R. 8776, 8934-8936 (1997) ("1997 Report and Order"); *In the Matter of Federal-State Joint Bd. on Univ. Serv.*, Recommended Decision, 19 F.C.C.R. 4257, 4259, 4294-4295 (2004); *In the Matter of Federal-State Joint Bd. on Univ. Serv.*, Report and Order, 20 F.C.C.R. 6371, 6376 (2005) ("2005 Report and Order"). Although limiting federal subsidy support to a single connection per

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<sup>3</sup>Although the FCC has sought review and comment relating to the basis of support for competitive ETCs and whether that should be modified, no modifications have been made to date. *Federal-State Joint Bd. on Univ. Serv. Seeks Comment on Certain of the Commission's Rules Relating to High-Cost Univ. Serv. Support*, Public Notice, 2004 WL 1827242 \*\*9-10 (F.C.C. Aug. 16, 2004); *In the Matter of Federal-State Joint Bd. on Univ. Serv.*, Report and Order, 20 F.C.C.R. 6371, 6376 (2005).

customer has been considered, there is currently no limit on the number of “carriers [that] may receive support in high-cost areas, [or] the number of supported connections each carrier provides to a customer.” 3 *J. Telecom. & High Tech. L.*, *supra* at 416. See 2005 Report and Order, *supra* at 6376.

Colorado has created its own state universal service fund, the Colorado High Cost Support Mechanism, with contributions from providers of intrastate telecommunications service to the public. 4 Colo. Code Regs. § 723-41-7.1. A carrier may be eligible to receive this state funding if it is designated as an “eligible provider” or “EP” under 4 Colo. Code Regs. §§ 723-41-1 *et. seq.* and C.R.S. § 40-15-208. A carrier may be designated as a federal ETC without being designated as a state EP. In Colorado, the Commission is responsible for designating ETCs and EPs.

#### Facts

Western Wireless is a “telecommunications carrier” as that term is defined in the Act and provides commercial mobile radio services (“CMRS”) in Colorado and other states. Consistent with the manner in which wireless carriers operate, Western Wireless bundles intrastate and interstate services together in service packages which do not distinguish between or separately bill for interstate and intrastate calls.

In May 2001, upon applications filed by Western Wireless, the Commission designated Western Wireless as a federal ETC and state EP for certain areas (“WWI Areas”) in Colorado pursuant to a Stipulation and Settlement Agreement (“Stipulation”) entered into by Western Wireless, the Office of Commission Staff (“Staff”), and the Office of Consumer Counsel. (Record Vol. 5 at 001103-1163.) Under the Stipulation, as relevant to this case, the parties agreed to the

following:

1. the Stipulation has no legal effect outside of these proceedings and no precedential effect (Record Vol. 5 at 001107 & 001118);
2. Western Wireless will provide its ETC and EP universal service offerings in Colorado pursuant to the Stipulation (including attachments) and in accordance with a written Customer Service Agreement which contains Terms and Conditions in the form contained in Attachment 5 to the Stipulation (Record Vol. 5 at 001113 & 001129-1148);
3. Western Wireless' Operating Procedures applicable to its universal service offering in Colorado are contained in Attachment 6 of the Stipulation (Record Vol. 5 at 001113 & 001149-1160); and
4. Western Wireless will price its initial basic universal service ("BUS") offering in Colorado as described in the Service Description, Attachment 7 to the Stipulation, stated to be \$14.99, excluding taxes and governmental assessments (Record Vol. 5 at 001113 & 001161-1163).

On February 14, 2003, Western Wireless filed an application with the Commission for designation as a federal ETC, but not a state EP, in other areas of Colorado ("WWII Areas"). These areas are served by CenturyTel of Eagle, Inc. ("CenturyTel"), the incumbent local exchange carrier. Western Wireless did not submit a BUS plan for review or approval. The Staff, CenturyTel, Colorado Telecommunications Association, Inc., and N.E. Colorado Cellular, Inc. ("NECC") intervened in the proceedings on Western Wireless' second application and a hearing was held. At that time, the Commission consisted of Commissioners Polly Page, Jim Dyer, and

Gregory E. Sopkin, the Chairman.

By Decision dated May 26, 2004, the Commission, acting through Commissioners Page and Dyer, conditionally granted Western Wireless' application as follows:

... [B]ased on the ... findings regarding our legal authority and the public interest requirements of CMRS, ETC providers, and in concert with our previous decisions granting ETC status to rural wireless providers, we find that designating Western Wireless as an ETC is in the public interest. However, this is only when conditioned with important Commission standards including affordability and consumer protection. Specifically, we will grant Western Wireless' application and designate Western Wireless a federal ETC subject to the requirement that it submit the pricing plans it intends to offer in the five wire centers for Commission approval. We further determine that Western Wireless grant of ETC status will be subject to the terms and conditions provided in the WWI Stipulation regarding consumer protection.

(Record Vol. 3 at 000702, ¶ 113.)

Western Wireless had contended that the Commission's role was "to designate carriers, not approve offerings," and that it should be designated as an ETC without complying with the "consumer protection or affordability rules" recommended by the Staff. (Record Vol. 3 at 000659 & 662.) NECC, one of the intervenors, argued that the Staff's proposed conditions should be rejected because ILEC-style regulations are inappropriate for competitive ETCs. NECC also argued that the FCC has preempted many of the ILEC-style regulations present in the WWI Stipulation, rate and entry regulations are preempted, and requiring CMRS ETCs to submit individual rate plans to the Commission for approval amounts to an unlawful regulation of CMRS carrier rates. (Record Vol. 3 at 000665-667.)

The Commission agreed with its Staff and found that designating Western Wireless as an ETC is in the public interest "only when conditioned with important Commission standards including affordability and consumer protection." (Record Vol. 3 at 000674, ¶57.) The



Commission found that Western Wireless should be required to tender an affordable BUS offering as a condition to receiving ETC status and the attendant public subsidy. (Record Vol. 3 at 000676, ¶61.) The Commission found that 47 U.S.C. § 332(c)(3)(A), which preempts states from regulating the entry of or rates charged by CMRS providers, did not preclude it from exercising its jurisdiction under 47 U.S.C. §§ 254(i) and 214(e) to impose these requirements and, further, requiring the showing of affordability was not rate-making as contemplated under § 332(c)(3)(A). (Record Vol. 3 at 000682-686.) The Commission did not identify any criteria or standard to determine affordability but merely stated that Western Wireless would be required to provide sufficient information to demonstrate that the rates it intended “to charge for its BUS offering are just, reasonable, and affordable.” (Record Vol. 3 at 000685, ¶76.)

The Commission found the standards set out in the WWI Stipulation were reasonable, did not constitute a barrier to entry, and that its requirements were consistent with the Act and Colorado law. (Record Vol. 3 at 000699, ¶ 107.) The Commission also found that if the conditions on approval of Western Wireless’ application were not imposed, there was a potential for discriminatory service offerings by Western Wireless between and among its own customer base and there would be a discriminatory impact upon other ETC providers who obtained ETC status in exchange for accepting terms and conditions substantially the same as those contained in the WWI Stipulation. (Record Vol. 3 at 000699-700.)

Chairman Sopkin dissented. (Record Vol. 3 at 000706-718.) While he agreed that conditioning the receipt of federal subsidies with quality service protection is rational, he believed that rate regulation is inappropriate as a matter of policy and is prohibited because federal law expressly preempted any state attempt to do so. (Record Vol. 3 at 000708-709.) Chairman

Sopkin concluded that “[t]he ability to reject a rate offering is, of course, rate regulation. . . .” (Record Vol. 3 at 000715.)

On June 16, 2004, Western Wireless filed a Petition for Rehearing, Reargument, or Reconsideration (“Petition”), which included arguments that imposing an “affordability” requirement is rate regulation prohibited under 47 U.S.C. § 332(c)(3)(A). That Petition was considered only by Commissioners Sopkin and Page. Apparently Commissioner Carl Miller had replaced Commissioner Dyer and did not participate in reconsideration of the Decision. Commissioner Page voted to deny the Petition in its entirety while Chairman Sopkin voted to grant the Petition on Western Wireless’ arguments that the Commission did not have authority to require a showing of affordability or impose quality of service standards as a condition to the grant of ETC status. (Record Vol. 3 at 000756-775.) There being no majority in favor, the Petition was denied on July 9, 2004. Commissioners Page and Sopkin issued separate Statements of Position.

In rejecting Western Wireless’ Petition, Commissioner Page stated that because the Commission did not require Western Wireless to file its rates or terms and conditions of service in a tariff filing, and was “merely requiring it to provide us with its initial rates to determine whether it is offering basic universal service at just and affordable rates as § 254(i) instructs,” the Commission was not engaged in rate regulation. (Record Vol. 3 at 000770.) Commissioner Page also rejected Western Wireless’ argument that the Commission exceeded its authority by imposing customer service and service quality conditions on granting its ETC status, relying on the Memorandum Opinion and Order of *In the Matter of Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications*

*Carrier in the Commonwealth of Virginia*, 19 F.C.C.R. 1563 ( 2004).

Chairman Sopkin concluded the law was clear that the Commission could not regulate wireless rates and “a state commission’s ability to reject ‘unaffordable’ rates is rate regulation.” (Record Vol. 3 at 000761.) In a departure from his original opinion on service quality, he agreed with Western Wireless’ arguments that it is improper and unwise to regulate the service quality of Western Wireless’ offerings, and Western Wireless’ offer in its Petition to abide by the CTIA Consumer Code as a condition of ETC designation was sufficient. (Record Vol. 3 at 000765-766.)

#### Discussion

In Count I Western Wireless claims the Commission is regulating rates and has no authority to do so because of Federal law preemption in 47 U.S.C. § 332(c)(3)(A).

Section 214(e)(2) grants the Commission authority to designate ETCs if the requirements of § 214(e)(1) are met and, for an area that is already served by a rural telephone company, if the designation is in the public interest. Section 254(i) states that the FCC and “the States should ensure that universal service is available at rates that are just, reasonable, and affordable.” Section 332(c)(3)(A) of Title 47 states:

#### **(3) State preemption**

(A) . . . no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications at affordable rates.

Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if the State demonstrates that –

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

In this case, the defendants contend the conditions that Western Wireless must price its services in accordance with Attachment 7 to the Stipulation and must submit its pricing plans for Commission approval were necessary to ensure that the rates charged are “just, reasonable and affordable” under § 254(i), ETC designation is in the “public interest” under § 214(e), and rates are not discriminatory. That is a policy decision which the Commission may make but to implement it the Commission must follow the procedures prescribed by § 332(c)(3)(A). Under Section 332(c)(3)(A) and the corresponding regulation at 47 C.F.R. § 20.13 states may regulate rates to ensure they are just, reasonable, or nondiscriminatory.

Under Section 332(c)(3)(A), in order to regulate rates, a state must petition the FCC for authority to do so. The regulations implementing that statute provide the petition must include:

(1) Demonstrative evidence that market conditions in the state for commercial mobile radio services do not adequately protect subscribers to such services from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory . . . [or]

[(2) . . . ] [D]emonstrative evidence showing that market conditions for commercial mobile radio services do not protect subscribers adequately from unjust and unreasonable rates, or rates that are unjustly or unreasonably discriminatory, and that a substantial portion of the commercial mobile radio service subscribers in the state or a specified geographic area have no alternative means of obtaining basic telephone service. This showing may include evidence of the range of basic telephone service alternatives available to consumers in the state.

47 C.F.R. § 20.13(a)(1). The petitions must also “identify and describe in detail the rules the state proposes to establish if the petition is granted.” *Id.* at § 20.13(a)(4).

Under 47 C.F.R. § 20.13( a)(2), evidence to be provided by the state to support the petition may include:

- (i) The number of commercial mobile radio service providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state;
- (ii) The number of customers of each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider;
- (iii) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable;
- (iv) An assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state;
- (v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry;

(vi) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the state;

(vii) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative; and

(viii) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile radio service providers, including statistics and other information about complaints filed with the state regulatory commission.

The state bears the burden of proof and interested parties may file comments after public notice of the state's filing of a petition. If the petition is granted, the FCC will authorize the state to regulate rates only for a reasonable period of time. *Id.* at § 20.13(5)-(7); 47 U.S.C. § 332(c)(3)(A).

Here, the Commission has not only failed to follow the prescribed procedure but also arbitrarily and capriciously imposed an "affordability" review without setting forth any standards or criteria for its determinations. The Commission's conditions constitute rate regulation contrary to the Act. It had no authority to do so.

In Count II Western Wireless alleges that the Commission has no authority to regulate interstate services. The defendants do not disagree but argue that ETC services are subject to Commission oversight. Because interstate and intrastate services are not separable by wireless service carriers in the competitive market they serve, the Commission's position that it is not regulating interstate services is not tenable.

In Counts III and IV, Western Wireless challenges the quality of service standards imposed by the Decision because the requirements conflict with section 214(e)(1), conflict with the FCC's pronouncement in *In the Matter of Federal-State Joint Bd. on Univ. Serv.*, 12 F.C.C.R. 8776 (1997), effectively change Western Wireless' regulatory status to that of an incumbent local exchange carrier, and fail to comply with section 254(f). Section 254(f) allows states to "adopt regulations not inconsistent with the Commission's [FCC] rules to preserve and advance universal service" and to "adopt regulations to provide for additional definitions and standards. . . ."

Although § 332(c)(3)(A) prohibits a state from regulating the entry of or rates charged by carriers such as Western Wireless, it does not prohibit "a State from regulating the other terms and conditions of commercial mobile services," as recognized by the FCC in its recent 2005 Report and Order, *supra* at 6384-6385, ¶31.

In that Report, the FCC adopted minimum requirements for a telecommunications carrier to be designated as an ETC where the FCC acts to designate pursuant to section 214(e)(6). One such requirement is for an applicant to demonstrate that it will satisfy consumer protection and service quality standards, which the FCC concluded was not inconsistent with section 332 of the Act:

While Section 332(c)(3) of the Act preempts the states from regulating rates and entry of CMRS providers, it specifically allows states to regulate the other terms and conditions of commercial mobile radio services. Therefore, states may extend generally applicable, competitively neutral requirements that do not regulate rates or entry and that are consistent with sections 214 and 254 of the Act to all ETCs in order to preserve and advance universal service.

*Id.* at 6384-6385, ¶31. The guidelines established in the 2005 Report and Order are not binding

on the states and the FCC declined to mandate that state commissions adopt the FCC requirements for ETC designations. *Id.* at 6397-6398, ¶61. The FCC encouraged states that exercised jurisdiction over ETC designations under § 214(e)(2) to impose the same requirements.

While the Commission may impose quality of service standards which do not constitute a barrier or condition to entry precluded under § 332(c)(3)(A), such standards may only be imposed through regulations adopted under § 254(f) and following the rule-making procedures under C.R.S. §§ 24-4-101 *et seq.* (State Administrative Procedure Act) ("Colorado APA"). Section 254(f) provides:

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

Under the Colorado APA, the Commission is required to give notice of its proposed rule-making, provide the terms or substance of the proposed rule, and hold a public hearing where interested persons may submit their views or otherwise participate. C.R.S. § 24-4-103. The rules promulgated must be based on and supported by the record, which includes a record demonstrating a need for the regulation, that proper statutory authority exists for the regulation, and that the regulation does not conflict with any other provisions of law. C.R.S. § 24-4-103(4)(b). Applying such procedures ensures the requirements of § 254(f) are met. In the absence of adopted regulations which set forth the applicable quality of service standards, such



standards cannot be imposed.

The plaintiff's claim under 42 U.S.C. § 1983 is that the conditions imposed violate the Act and that issue has been resolved. To the extent that Western Wireless is claiming a property right protected by the Fourteenth Amendment to the U.S. Constitution, the right is created by the Act and is, therefore, co-extensive with the foregoing analysis. Accordingly, the § 1983 claim is redundant.

The court declines to exercise supplemental jurisdiction as to Count VI alleging the Commission exceeded its authority under C.R.S. §§ 40-1-103 and 40-15-401. That claim raises novel or complex issues of state law and requires the interpretation of Colorado statutes that must be decided under the procedures for judicial review of agency action set forth in C.R.S. § 40-6-115 and C.R.C.P. 106. Upon the foregoing, it is

ORDERED, ADJUDGED and DECREED that the conditions imposed in the Decision of May 26, 2004 that WWC Holding Co., Inc. submit the pricing plans it intends to offer for Commission approval is preempted under 47 U.S.C. § 332(c)(3)(A) and the Commission is enjoined from enforcing this requirement as a condition to designating WWC Holding Co., Inc. as an eligible telecommunications carrier under the Act; it is

FURTHER ORDERED, ADJUDGED and DECREED that the Commission's Decision conditioning the ETC designation on compliance with the WWI Stipulation constitutes unlawful regulation of WWC Holding Co., Inc. as an interstate carrier and the Commission is enjoined from enforcing this requirement as a condition to designating WWC Holding Co., Inc. as an eligible telecommunications carrier under the Act; it is

FURTHER ORDERED that Count VI based on violation of Colorado law is dismissed without prejudice; and it is

FURTHER ORDERED that these rulings are all the relief that can be granted to the plaintiff in this civil action and the Clerk shall enter final judgment for the plaintiff.

Dated: March 8th, 2006.

BY THE COURT:

s/ Richard P. Matsch  
Richard P. Matsch, Senior District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Senior District Judge Richard P. Matsch

Civil Action No. 04-cv-01682-RPM

WWC HOLDING CO., INC.,

Plaintiff,

v.

GREGORY E. SOPKIN,  
POLLY E. PAGE, and  
CARL MILLER,  
in their Official Capacities as the Commissioners of the  
Public Utilities Commission of the State of Colorado,

Defendants.

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JUDGMENT

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Pursuant to the Memorandum Opinion and Order entered by Senior Judge Richard P. Matsch on March 8, 2006, it is

ORDERED, ADJUDGED and DECREED that the conditions imposed in the Decision of May 26, 2004 that WWC Holding Co., Inc. submit the pricing plans it intends to offer for Commission approval is preempted under 47 U.S.C. § 332(c)(3)(A) and the Commission is enjoined from enforcing this requirement as a condition to designating WWC Holding Co., Inc. as an eligible telecommunications carrier under the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.*; it is

FURTHER ORDERED, ADJUDGED and DECREED that the Commission's Decision conditioning the ETC designation on compliance with the WWI Stipulation constitutes unlawful regulation of WWC Holding Co., Inc. as an interstate carrier and the Commission is enjoined from enforcing this requirement as a condition to designating WWC Holding Co., Inc. as an eligible telecommunications carrier under the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.*; it is

FURTHER ORDERED that Count VI based on violation of Colorado law is dismissed without prejudice; and it is

FURTHER ORDERED AND ADJUDGED that judgment is entered for the plaintiff and against the defendants. The complaint and civil action are dismissed. The plaintiff is awarded its costs upon the filing of a bill of costs within ten days.

DATED: March 8, 2006.

GREGORY C. LANGHAM, CLERK

By s/ M.V. Wentz  
Deputy

APPROVED:

By s/ Richard P. Matsch  
Richard P. Matsch, Senior District Judge